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CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME

JOHN B. WINSLOW
Ex officio CHIEF JUSTICE

ROUJET D. MARSHALL

ROBERT G. SIEBECKER

JAMES C. KERWIN

WILLIAM H. TIMLIN

JOHN BARNES
(Until February 22, 1916)

AAD J. VINJE

MARVIN B. ROSENBERRY
(From February 23, 1916)

Attorney General - - WALTER C. OWEN

Clerk - - - ARTHUR A. MCLEOD

MEMORANDA.

Mr. Justice MARSHALL took no part in the decision in *Randall v. M., St. P. & S. S. M. R. Co.*, reported in 162 Wis. on page 507. He took no part in the decision of cases reported in this volume on pages 20–24, 151–159, 293–306, 312–321.

Mr. Justice TIMLIN took no part in the decision of cases in this volume except those reported on pages 1–24, 270–273, 275–282, 484–507.

Mr. Justice ROSENBERRY took no part in the decision of the cases reported in this volume on pages 1–19, 300–306.

This volume includes all the cases, not previously reported, which have been finally determined by the court. In five cases of the January term, in which opinions were filed in May and June, 1916, motions for rehearing are still pending.

Madison, August 7, 1916. F. K. C.

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CASES DETERMINED

AT THE

January Term, 1916.

BRIGHT, Respondent, vs. CITY OF SUPERIOR and others, Appellants.[1]

January 12—February 22, 1916.

Waters: River or arm of lake? Title to river bed: Platting and conveyance: Requisites of plat: Acknowledgment by agent: Ratification: Equity: Injunction: Protecting abstract property rights as against enterprise of great public benefit: Vacation of platted streets in Superior Bay: Election of remedies: Appeal: Direction of judgment, to avoid further litigation.

1. That body of water which lies along the northeast front of the city of Superior, though frequently called the Bay of Superior on maps and in public speech, is in fact a widening of the St. Louis river, not an arm of Lake Superior; its bed was the subject of private ownership and platting; and the riparian proprietors might by conveyances separate the ownership of the lands on the bank from the lands in the bed of the river.
2. Secs. 1–5, ch. 41, R. S. 1849, required that a plat of lands should be certified by the surveyor and acknowledged by the proprietor and recorded. The proprietors of land in the present city of Superior caused a plat thereof to be made, acknowledged, and recorded by one B., a former owner. The surveyor's certificate recited that the plat was made and designed under the direction of one N. "as agent of the proprietors," and it was indorsed as approved by N. as such agent. Afterwards in a duly acknowledged and recorded power of attorney from the proprietors, running to N., the platted lands were described and it was stated that "the town of Superior has been laid out, surveyed and the plat thereof recorded . . . under our direction and authority."

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[1] This case was not printed in its regular order because of the pendency therein of a motion for a rehearing, which was afterwards abandoned.—REP.

Held, that this was a complete ratification of the acts of B. and N., and rendered the plat a valid one under said statute.

3. An enterprise involving a great public benefit both to the municipality and to the people of an important city should not be halted and killed by the courts at the suit of an individual citizen whose abstract rights may be infringed upon, but whose injury, if any, will be inconsequential and conjectural.

4. Thus, in an action by the owner of two small vacant lots on a sandbar in the Bay of Superior, to prevent the consummation of a compromise agreement between the city of Superior and two railway companies pursuant to which the city council had passed an invalid resolution vacating a number of the platted but unimproved streets (including one upon which said lots abutted) in a certain tract of land, partly filled and partly under water, lying for the most part between the original shore line of the bay and the established harbor line,—it appearing, among other things, that the railway companies had acquired by purchase all the submerged lots involved except those of plaintiff; that his lots were distant from the shore and inaccessible except by small boats; that no use had ever been made of them, and none apparently was contemplated; and that the carrying out of the agreement and vacation of the streets would increase rather than decrease the value of plaintiff's lots and would result in a substantial benefit to the city and its people generally,—it is *held* that no injunctive relief should be granted.

5. Defendants in such action, by their answer, consented that all damages which plaintiff would sustain by reason of the carrying out of said agreement and vacation of said streets might be determined either by the court or a jury at plaintiff's election, and offered to pay such damages when so determined. The trial court, although it determined the amount of such damages, held that plaintiff was entitled to an injunction and he accepted that relief. On appeal, it being held that plaintiff was not entitled to any equitable relief, it is further *held* that although he had made his election of remedies, which would ordinarily be final, yet, the offer of defendants never having been withdrawn, this court may, in order to avoid further litigation, direct a judgment that plaintiff recover the amount of damages so determined.

APPEAL from a judgment of the circuit court for Douglas county: E. C. HIGBEE, Judge. *Reversed.*

This is an equitable action by the owner of two lots in the original plat of the city of *Superior* seeking to have set aside and declared void a certain agreement entered into by the city

with the appellant railway companies, also a certain resolution adopted by the city council carrying out said agreement and vacating certain platted streets, alleys, and harbor slips in said city, and to enjoin the defendants from asserting any rights under the agreement and resolution because of the invalidity of said agreement and resolution and because by the vacating of said streets and alleys he would be deprived of access to his said lots and thus suffer irreparable injury. The grounds on which it was claimed that the agreement and ordinance were void will appear later. The defendants by their answers denied that the alleged streets, alleys, and slips were ever dedicated to the public or accepted; alleged that the vacation resolution was validated by ch. 450 of the Laws of 1913, and that the plaintiff had an adequate remedy at law; and offered to compensate the plaintiff for any damages suffered by reason of the vacation of the streets, alleys, and slips.

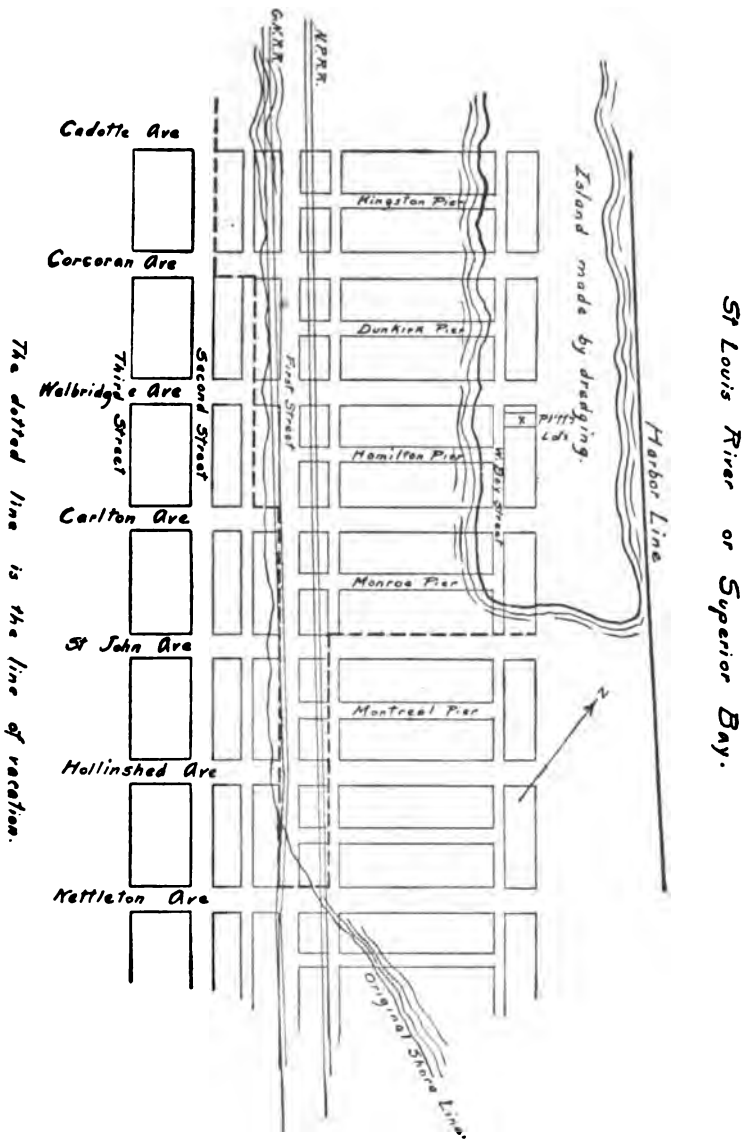
The action was tried by the court. The fundamental facts were not seriously in dispute but the legal inferences therefrom were. The facts, either as found by the court or as established by the evidence, will now be briefly stated.

In the year 1854 W. W. Corcoran and others who owned government lots 1, 2, and 3 in section 19, town 49, range 13 west, fronting on St. Louis river (or Superior Bay, as it is more frequently known), Douglas county, Wisconsin, caused a plat thereof to be made and acknowledged by one Becker, their agent and the former owner of the lands, dividing the same into blocks, streets, avenues, alleys, slips, and piers. This plat was called the "Plat of Superior Western Division" and was recorded in the register's office in September, 1854, and is the original and only plat of that part of the city of *Superior* contained within the limits of said government lots which has ever been made. It has always been treated as a valid plat. All real estate within its limits has been sold and conveyed with reference to it and all taxation and public improvements of every nature have been based upon it. The

plat covered a large area of solid ground stretching back southwest of the river (or bay), and on it stands the eastern part of the city of *Superior* with many houses, stores, and other buildings constructed on, and with reference to, the lots and blocks laid out on the plat. In a word, the city has been built upon the plat, and the streets, lots, and blocks marked thereon have been accepted by private owners and public authorities. The plat extended out into the waters of the river or bay more than a thousand feet, and this part was divided into lots, blocks, slips, and piers substantially as if the same were on land. The water front thus platted was more than a mile in length. A better idea of the situation may perhaps be gained from examination of the sketch here inserted, which reproduces the substantial features of that part of the plat specially involved in this litigation, it being remembered that the railroads and "harbor line" were nonexistent in 1854.

For many years there was no improvement of this water front. The streets and public ways on land were opened up and improved, but so far as the submerged part of the plat was concerned it remained as it was when platted, being anywhere from three feet to ten feet under water.

In the year 1881 the Northern Pacific Railroad Company, predecessor of the *Northern Pacific Railway Company,* built a line of railroad on piling or trestle work across the platted lands about 300 feet from shore approximately as represented on said sketch, and at some time later the defendant *Great Northern Railway Company* built a line of railway nearer shore, substantially as shown in the sketch. As early as 1896 the trestle work supporting the *Northern Pacific* track was filled in with dirt, leaving seven or eight openings through which small boats could pass. After the year 1898 the entire space between the *Northern Pacific* track and the shore was filled in and switch tracks constructed on a considerable part of the filled ground. In the year 1899 the United States government fixed a harbor line as indicated in the sketch and dredged a deep-water channel for navigation purposes outside



of this line, pumping the sand so dredged back into the water on the shore side, thus forming islands or sand-fills along the southern edge of the harbor line some 300 feet in width and

of various lengths. A part of one of these islands is indicated in the sketch, and the plaintiff's lots, two in number, 25 by 120 feet each in size, are situated upon this island at the place indicated in the sketch. The city of *Superior* also established a harbor line, which in this locality coincides with the harbor line fixed by the United States government. The plaintiff bought one of his lots in October, 1911, and the other in May, 1913. It seems to be admitted that at some time prior to 1910 the defendant railway companies acquired by purchase all the submerged lots involved in the vacation proceedings except the lots owned by the plaintiff, also that they acquired the easement to cross the street ends which the tracks crossed. For a number of years prior to 1910 there had been a controversy between the city of *Superior* and the defendant railway companies as to the rights of the public in the streets, alleys, and slips marked upon the plat of the submerged lands, and in the last-named year a suit was brought by the city against the railroad companies to determine the city's rights therein, which suit was thereafter removed to the proper federal court. After the removal active negotiations were had between the city authorities and the railroad companies with a view of compromising the conflicting claims of the public and the companies with regard to the streets and alleys aforesaid. These negotiations were given great publicity in the newspapers and the subject was considered and discussed by various business organizations of the city. After long discussion and negotiation an agreement of compromise between the city on one side and the railway companies on the other was formulated which provided in substance (1) that the city should vacate all but four of the platted streets in a rectangular piece of land about a mile and one-half in length, bounded on the southwest partly by the line of Second street and partly by a line indicated by the dotted line upon the sketch aforesaid, on the harbor side by the "harbor line," on the southeast end by the dotted line indicated in the sketch, and on the

northwest end by a line running from a continuation of Second street and at right angles therewith to the harbor line. The southwest part of this territory consisted principally if not wholly of filled land covered with the defendants' railroad tracks, and the remainder consisted of submerged land except where the islands aforesaid formed by dredging rise above the surface of the water; (2) that four streets running across the territory aforesaid from southwest to northeast were not to be vacated, to wit, R. street and L. street (both being on the northwest part of the territory and not shown on sketch) and Carlton avenue and St. John avenue (see sketch), beginning at the line of the alley outside of First street and running to the harbor line; (3) that the city should reserve perpetual easements for sewer purposes under two streets not appearing on the sketch; (4) that the railway companies should convey to the city the submerged land between Carlton avenue and St. John avenue beginning at the line of the alley outside of First street and extending to the northeast line of the plat, also another tract of larger size and similarly located near the northwest end of the tract but not shown on the sketch; (5) that the railway companies should within three years construct a viaduct for pedestrians and vehicles over all tracks at L. street; (6) that the companies should also construct viaducts at R. street and at Carlton or St. John avenue (as the city might choose) when necessity and convenience require them as determined by the Wisconsin railroad commission; (7) that the companies should lay out and dedicate a diagonal street forty feet wide beginning in First street at Nettleton avenue and extending to the property transferred to the city between Carlton and St. John avenues, and remove all railroad tracks from the said street except one lead track. The agreement contained other provisions not necessary to be quoted here and provided that the action should be continued to the January, 1914, term of court, that the council should pass the vacation resolution, and

that if the Wisconsin legislature should pass a validating act (a copy of the proposed act being attached to the agreement) and the time limit fixed in the act should expire without action challenging the vacation being brought, the vacation should be deemed completed. The proposed validating act consisted of a section amending sec. 926—125*q*, Stats. 1911, so as to provide that no action should be brought to set aside an order theretofore made vacating streets or public grounds (where appearance had not been made nor damages claimed in the preliminary proceedings) unless commenced within six months from the passage of the act. This agreement was executed by the railway officials in January, 1913, and was then thrown open to public discussion in *Superior*. The newspapers published its terms with plats showing the effect, public hearings were had before the city council, the matter was considered by various business clubs and commercial organizations of the city, and the proposed settlement met with universal approval. After this public discussion and consideration and on March 17, 1913, the resolution of vacation was passed by the council and on the following day the agreement was executed by the city officers. This action was commenced in May following. The proposed act was submitted to the legislature but was not passed as drawn, but was passed June 6, 1913, with some modifications, as will appear by consulting ch. 450, Laws 1913 (sec. 926—125*q*, Stats. 1913). These modifications consisted of provisions at the end of the section to the effect that such orders should be deemed validated at the end of the six months except as they might be invalidated by actions *then pending*, and that in any such action, if the plaintiff's interest could be fully compensated in damages, the damages should be assessed and paid and the action terminated thereby without affecting the validity of the vacation. In October, 1913, the city and the railway companies made a supplemental agreement modifying the original agreement, by which the companies agreed to pay all

damages assessed against the city in any action brought to challenge the validity of the vacation proceedings and confirmed the original agreement as so modified. The following specific findings made by the court are quoted in full because they state the facts covered by them as briefly and satisfactorily as they can be stated:

"That the streets in question sought to be vacated have none of them ever been opened, improved, or traveled as streets.

"That the compromise agreement in question and the vacation resolution have caused no physical change to be made in the streets, or in the means of reaching the lots in question. There has been no physical closing of the platted streets and none has been threatened.

"That the lots in question are vacant and unoccupied, they always have been vacant and unoccupied, no use has ever been made of them, and there is no evidence to indicate what if any use the plaintiff intends to make of the lots.

"That the plaintiff's lots are not by themselves and in their present condition suitable or adapted for any commercial use; that if the terms of said compromise agreement could be carried out and said lots combined with other lands so as to form a large and compact tract suitable for docks and warehouse purposes, the value of said lots would be very considerably enhanced.

"That the damage which would result to plaintiff's lots by the vacation and closing of the streets pursuant to the terms of said ordinance and the interest of the plaintiff can be fully compensated in money damages.

"That the lots in question cannot now be reached except by passing over navigable water, and there is no evidence that the city will ever cause the platted streets in question to be filled or improved, either as filled streets or as water slips.

"That the lots of the plaintiff at the time of the filing of the plat were under eight or ten feet of water in the Bay of Superior, subsequently they were filled in by sand pumped from the government channel in the Bay of Superior, but said lots are still surrounded by waters more than 300 feet in width and eight or ten feet in depth."

Judgment was entered perpetually restraining the city officials from carrying out the terms of the resolution of vacation, and the defendants appeal.

For the appellant *City of Superior* the cause was submitted on the brief of *H. V. Gard* and *T. L. McIntosh.*

For the appellants *Northern Pacific Railway Company, Great Northern Railway Company,* and *Eastern Railway Company of Minnesota* there was a brief by *Hanitch & Hartley,* attorneys, and *C. W. Bunn,* of counsel, for *Northern Pacific Railway Company,* and *John A. Murphy,* attorney for *Great Northern Railway Company* and *Eastern Railway Company of Minnesota;* and the cause was argued orally by *Louis Hanitch, J. A. Murphy,* and *C. J. Hartley.*

For the respondent there was a brief by *D. E. Roberts* and *Olin, Butler, Stebbins & Stroud,* and oral argument by *Mr. Roberts, Mr. Ray M. Stroud,* and *Mr. Michael S. Bright.*

The following opinion was filed March 6, 1916:

WINSLOW, C. J. It is conceded that the resolution of vacation was void at the time of the passage because of the entire lack of the petition and the notice to property owners which are required by the statute. Secs. 927, 904, Stats. 1913. This renders it unnecessary to consider any of the other grounds upon which the validity of the resolution and the agreement which preceded the resolution are challenged. The resolution being void when passed, its execution can, of course, be enjoined by a court of equity at the suit of one who, under established legal principles, suffers thereby an injury for which there is no adequate remedy at law and who seasonably brings his action. The conclusion which we reach on the merits of the plaintiff's claim renders unnecessary any decision as to the validity or applicability to the present litigation of the validating act referred to in the statement of facts, viz. ch. 450 of the Laws of 1913, and we make no comment upon it.

The vital question in the present case is whether the plaintiff has shown himself to be such a person as is last above described. This question is answered by the appellants in the negative because they say (1) the submerged lands attempted to be platted were and are a part of the bed of Lake Superior and hence were not the subject of private ownership or platting, and consequently the supposed streets do not exist and the plaintiff has no lots; (2) in any event the plat was not executed in accordance with the requirements of the statute and hence did not operate as a dedication of the streets marked thereon to public use; and (3) the plaintiff has not shown himself to be injured but rather benefited by the vacation of the streets in question. These propositions will be discussed in their order.

1. Was the submerged land platted a part of the bed of Lake Superior, or of the St. Louis river? The circuit judge, who gave this case the most careful and painstaking consideration, concluded (contrary to his first impressions) that it was a part of St. Louis river, and we fully agree with his conclusion. The fact that the plaintiff's lots "are covered by the waters of St. Louis river" was affirmatively alleged in the answer of the railroad companies, while in the answer of the city it is said that the plaintiff's lots "were platted on the navigable waters of the Bay of Superior or St. Louis river." However, the question seems to have been treated as an open one in the trial court and it seems better that it should be so treated here. The question is whether that body of water about seven miles long and from three quarters of a mile to a mile in width, commonly known as Superior Bay, which lies along the northeast front of the city of *Superior,* is a widening of St. Louis river, or an arm of Lake Superior. The situation will be better understood by referring to a map of the westerly end of Lake Superior. It will be seen that there juts out from the extreme west end of the lake, immediately in front of the city of Duluth on the Minnesota shore, a long

and narrow tongue of land seven miles or more in length, in a southeasterly direction, forming the northeast boundary of the so-called Superior Bay. Another tongue of land extends in a northwesterly direction from the Wisconsin shore, and these two tongues of land are known respectively as Minnesota Point and Wisconsin Point. Their ends are separated by a 500-foot channel locally known as the Superior entry. This channel is and has always been recognized as the mouth of the St. Louis river, and through it (though now deepened and enlarged by dredging) the waters of that river have always been discharged into Lake Superior. The proof is plenary and convincing that this channel has been recognized by the national and state governments and by the people generally as the mouth of the St. Louis river from a very early period. In the map made by J. N. Nicollet (which is part of a report covering explorations and hydrographical surveys made under the authority of the United States War Department in the years 1836 to 1839, published in 1843 as part of Senate Document No. 237, second session of the 26th Congress) the body of water in question is plainly represented as a part of the river and the words "Fond du Lac Superior" (*bottom* or *farthest part of Lake Superior*) appear just outside of the above described channel or entrance, printed upon the space representing the body of the lake. Following this comes the direct governmental recognition and adoption of this map in the Wisconsin enabling act of 1846. In this act the boundaries of the proposed state are specifically traced and at this point are given as follows: "thence through the center of Lake Superior to the mouth of the St. Louis river; thence up the main channel of said river to the first rapids in the same, above the Indian village, *according to Nicollet's map.*" The same boundary line is given in the constitution of Wisconsin (art. II, sec. 1), and the enabling act for Minnesota, passed in 1859, recognizes and adopts the same line. The government survey was made in 1853, and the field-notes

show that the aforesaid channel between Minnesota and Wisconsin Points was recognized by the surveyors in fixing their meander lines as the mouth of the St. Louis river. A lithographed map of the new city, published in 1856 by the proprietors of the plat, while designating the body of water as the Bay of Superior, bears also the words "St. Louis river" printed upon a part of the center portion of the so-called bay where the channel would naturally be. In a chart of Lake Superior published by the United States War Department in 1870 the mouth of the aforesaid channel is designated as the mouth of the St. Louis river.

It is true that the body of water in question is frequently called the Bay of Superior both on maps and in public speech, but we regard this as very natural and entirely inconclusive. As matter of fact there always was a channel in the central part of this so-called bay through which the waters of the river always moved towards the lake; that the river is continuous from its source to its entrance into Lake Superior through the channel aforesaid and has always been so considered, seems to our minds well proven. It follows from this that the bed was the subject of private ownership and that the riparian proprietors could separate the ownership of the lands on the bank from the lands in the bed by conveyances. *Norcross v. Griffiths,* 65 Wis. 599, 27 N. W. 606; *Kelley v. Salvas,* 146 Wis. 543, 131 N. W. 436, and cases cited.

2. This brings us to the question of the execution of the plat and its validity as a statutory dedication. The statute (secs. 1–5, ch. 41, R. S. 1849) required that the same should be certified by the surveyor and acknowledged by the proprietor and recorded, and should then operate to vest the land intended for streets, alleys, ways, commons, or other public uses in the city or town in trust for the uses and purposes set forth and expressed or intended. It is undisputed that this plat was not signed or acknowledged by the proprietors (W. W. Corcoran and others), but by the former owner, one

Becker. The surveyor's certificate recites that the plat was made and designed under the direction of William H. Newton "as agent of the proprietors," and it is indorsed as approved by "William H. Newton, agent of the proprietors." It appears that on April 12, 1855, there was recorded in the office of the register of deeds a duly acknowledged power of attorney from Mr. Corcoran and his fellow proprietors, running to William H. Newton and R. R. Nelson, authorizing them, among other things, to cause certain lands owned by the proprietors, including the lands in the plat in question, to be surveyed for the purpose of making division of the same among the owners, to make partition thereof among such owners, and to convey the same in parcels to the several owners. In this power of attorney all the lands owned in common by the parties, including the platted lands, are described, and it is stated upon part thereof "the town of Superior has been laid out, surveyed, and the plat thereof recorded in the office of the register of deeds of said county of Douglas under our direction and authority."

It cannot be doubted that the proprietors, by duly executed power of attorney, could have authorized Becker and Newton to make acknowledgment and record the plat. *Nelson v. Madison,* 3 Biss. 244; *Bushnell v. Scott,* 21 Wis. 451. It is a familiar rule that what may be authorized in advance may be subsequently ratified, provided the ratification be of the same nature and executed with like formality as that required for conferring authority in the first instance. 2 Corp. Jur. p. 485, sec. 103; 1 Mechem, Agency (2d ed.) secs. 419, 420.

We see no escape from the conclusion that there is here a complete ratification of the previously unauthorized plat. Newton and Becker had attempted to make and record a valid plat as agents of the proprietors, and the proprietors by a duly executed, acknowledged, and recorded instrument afterwards certify to the world that the land was surveyed and the plat recorded under their direction and authority. It is diffi-

cult to see what further could have been done to make a good ratification. This conclusion renders unnecessary any consideration of the question whether the defendants are in any position to raise this objection, a matter about which there may be some doubt arising from the fact that the existence of the streets has been recognized by both the railroad companies and the city in the most unequivocal manner through all the litigation from the time the city commenced its action against the railroad companies in 1910 down to the present time. Indeed, if the streets do not exist and never have existed, the elaborate agreement entered into between the city and the railroads as well as the subsequent vacation proceedings would seem to be the veriest nonsense. *Ashland v. C. & N. W. R. Co.* 105 Wis. 398, 401, 80 N. W. 1101.

Nor is it necessary to consider the effect of the various general validation acts passed for the purpose of curing the defects existing in ancient plats and obviating the serious results to innocent purchasers which might follow from a decision holding such plats to have been defectively executed in the first instance. Secs. 1299*j*, 1299*k*, and 2216*b*, Stats. We entertain no doubt that the plat must now be considered as a valid statutory plat.

3. Has the plaintiff shown himself entitled to relief in equity? This is perhaps the most serious question in the case. We pass the contention made by the appellants that the plaintiff is not a purchaser in good faith; he will be treated as such. The situation then is substantially this: he owns two adjoining lots, each 25 by 120 feet in extent, on a sand-bar several hundred feet from shore, surrounded by water on every side; whether riparian rights go with the lots is an unsettled and doubtful question; they are not now and never have been used; there is not now and never has been any access to them by land; they have lain there for sixty years, most of the time quietly sleeping at the bottom of the river, but finally elevated to the light of day by the kindly as-

sistance of the United States government as an incident to the making of a channel for navigation; no public authorities have ever improved or thought of improving the mythical streets and alleys marked on the map which are formally vacated by the resolution in question; to improve them would mean also the filling in of the lots and blocks between and would involve great expense; so far as appears another sixty years would probably pass before the municipal authorities would feel justified in undertaking such a task; neither the public nor the plaintiff have ever had any way of access to the lots except by small boats nor have they apparently desired any other method of access; it does not appear that the plaintiff has any use for the lots, and, if he had, the vacation of the so-called streets does not affect the prospect of future access to them in any way.

The overwhelming weight of the evidence taken on the subject is to the effect that the vacation of the streets and alleys in the submerged part of the plat did not substantially affect the market value (so far as there can be a market value) of the lots. The reasons for this opinion are apparent and easily understood. The city stands at the head of probably the greatest inland waterway in the world, the gateway between the water system of the Atlantic and the railroad systems of the Pacific; its future, if it has a future, must be commercial and industrial, and it must necessarily depend in a very large degree upon the utilization of this wonderful landlocked water front. Transportation and manufacturing interests of the present day demand large unobstructed areas for their development; the day of the small enterprise of this nature is gone, probably never to return. If this water front is to be utilized, the existing subdivisions into small lots and blocks with frequent streets must disappear in one way or another. Hence the witnesses are quite unanimous in concluding that, if there be any change in the value of the plaintiff's lots resulting from the vacation proceedings, it is more likely

to be an increase rather than a decrease, and we see no reason to doubt the correctness of their conclusion. On this general subject the trial judge in his written opinion very aptly says:

"For the sixty-one years that have elapsed since the platting no use whatever has been made of the plaintiff's premises; no income has been derived therefrom and there is no intimation that any use of them is intended. In fact it is clear that unless combined with other lots so as to form a large compact tract they are valueless for any commercial purpose. Each of the two lots is twenty-five feet in width and they might be utilized for the site of a small boathouse, and if the scheme of the compromise agreement between the city and the railroad companies could be carried out the lots could probably be sold for more than they are now worth to be incorporated into a large tract suitable for dock and warehouse purposes."

No fair-minded person can carefully read the testimony and come to any other conclusion, as it seems to us. So we meet the question whether an enterprise involving a great public benefit both to the municipality and the people of an important city should be halted and killed by the courts at the suit of an individual citizen whose abstract rights have been infringed upon, but who will either suffer no injury or whose injury will be inconsequential and conjectural. This question has been met by numerous courts including our own and has been universally answered in the negative. In *Mahler v. Brumder,* 92 Wis. 477 (66 N. W. 502), at page 486 it was said: "Equity should not be successfully invoked merely to inflict injury or damage to the defendant, without securing any substantial right or benefit to the plaintiff;" and in the recent case of *Gimbel Bros. v. Milwaukee Boston Store,* 161 Wis. 489, 154 N. W. 998, it is said: "The present or threatened injury must be real and not trifling, transient, or temporary. . . . Courts generally exercise their discretion against issuing an injunction, where it will produce great public or private mischief, merely to protect technical, doubtful, or unsubstantial rights," citing many cases from other

jurisdictions. See, also, *Schuster v. Milwaukee E. R. & L. Co.* 142 Wis. 578, 126 N. W. 26. This doctrine seems to us eminently sane and sensible. It seems that it is not always remembered that courts are instituted and maintained not for the purpose of delicately poising the scales of abstract logic and recording results, but rather of aiding in the attainment of the ends of government by vindicating rights that are real. Especially is this true of a court of equity. In a case like the present its function is unquestionably to prevent a substantial wrong to the citizen, not to use its high powers to prevent an act which merely infringes upon an abstract or theoretical right but causes no substantial injury to any one; and in this latter situation the court, it seems, may well consider as controlling the fact (if it be a fact) that the threatened act will result in a substantial benefit to the municipality and its people generally.

In the present case the evidence seems to us to demonstrate that the plaintiff's injury is academic rather than real, or at most so insignificant in its character that no injunctive relief should be granted.

While we have had no difficulty in reaching this conclusion on the evidence before us it has not been entirely clear to us what form the judgment should take. If there be even slight damages they ought to be assessed either in the present action or in an action at law brought for that purpose after the dismissal of the present action. There has already been one long and expensive trial of this case; manifestly it would be desirable for both parties if the whole matter could be now closed and the necessity of another trial of the present action or the bringing of a new action obviated. We are of opinion that under the circumstances present in this case this may well be done.

The defendants have in effect stipulated and agreed to pay any damages found to exist by the trial court. Their answers contained a formal offer and consent that the damages might

be determined in the present action either by the court or by a jury at the plaintiff's election, and further, "these defendants hereby agree that this answer may stand as an agreement on the part of these answering defendants *to pay such damages* if any when they shall be so fixed and determined, and hereby offer and agree to assure the payment of such damages to be so fixed and determined by undertaking or deposit with the court, in such amount and in such manner as may be ordered by the court upon motion of the plaintiff." No undertaking or deposit was in fact made, and the court at the close of the case agreed with the plaintiff that he was entitled to equitable relief instead of money damages. Strictly speaking, the plaintiff doubtless exercised his election and refused the offer, yet the offer has never been withdrawn and still remains in the pleadings. The trial judge in his written opinion considered it his duty to make findings as to the damages and concluded as follows:

"But assuming that he has rights beyond the limits of his lot lines, the utmost value that can be put upon them is $750 apiece, and it is my judgment, from all the evidence, that a liberal allowance for damages in case the vacation proceedings are ultimately sustained is one third of the value of the lots."

It will be noticed that this allowance is based on the assumption that the lots extend to the harbor line, an assumption about which there may be much doubt.

While this was evidently considered a finding of fact by the trial judge, it was for some reason not inserted in the formal findings of fact.

Doubtless, under the offers contained in the answers the plaintiff might have accepted this sum and entered judgment upon it. He chose not to do so, however, and accepted the equitable relief awarded by the court. He is now held on defendants' appeal not to have been entitled to this equitable relief. While it is true that an election of remedies once made is ordinarily final, we think it entirely within the power of

this court, in view of the fact that the offers have never been revoked or withdrawn, to utilize and act upon them now in order to shape a final decree which shall avoid the necessity of further litigation. No harm can be done to the plaintiff by this course, for he will obtain more damages than he has in fact suffered; no harm will be done to the defendants, for they have consented thereto in advance; further litigation and expenditure of money will be avoided and equitable principles will be in every true sense observed and enforced.

The judgment will be that the judgment of the trial court be reversed, and the action remanded with directions to enter judgment awarding the plaintiff a recovery of $500 against the defendants, and in all other respects dismissing the complaint on the merits without costs to either party. But one bill of costs to be taxed by the appellants in this court.

By the Court.—It is so ordered.

VINJE, J., took no part.

SZELIWICKI, Respondent, vs. CONNOR LUMBER & LAND COMPANY, Appellant.

February 3—April 11, 1916.

Master and servant: Injury: Unsafe working place: Contributory negligence: Questions for jury: Evidence: Absent witness: Testimony given at former trial.

1. A finding by the jury to the effect that plaintiff, an employee in defendant's lumber yard, was struck and injured by a crosspiece thrown from the top of a lumber pile by another employee, is *held* to be sustained by the evidence, although no one saw the crosspiece strike him.
2. Further findings to the effect that the method of disposing of the crosspieces, as lumber was taken from the pile and loaded upon a wagon, was not reasonably adequate to render plaintiff's place of employment as free from danger as the nature thereof would reasonably permit, and that he was not guilty of contributory negligence, are also *held* to be sustained by the evidence.

3. A witness being absent from the state at the time of the second trial of the action, his testimony given at the first trial was admissible under sec. 4141a, Stats., where the issues of fact were the same at both trials, although the first trial went on the theory that the rights of the parties were governed by the common law and the second on the theory that such rights were governed by a statute (ch. 485, Laws 1911) which abrogated the common law.
4. It was not error to permit the testimony of such witness to be read as it appeared in the bill of exceptions on appeal from the judgment rendered at the first trial.

APPEAL from a judgment of the circuit court for Marathon county: A. H. REID, Circuit Judge. *Affirmed.*

This is an action to recover damages for a personal injury sustained by the plaintiff while a servant of the defendant.

The defendant owns and operates a sawmill and lumber yard at Laona, Wisconsin. This yard consists of driveways or alleys with piles of lumber on both sides. The plaintiff was in the employ of the defendant company and at the time in question was working about the yard picking up loose lumber or boards under the direction of the yard foreman. The foreman put him to work near a pile of crosspieces which had been used in piling the lumber, then left him, and went a short distance to where a car was being loaded with lumber. Other employees were taking lumber from a pile about twenty-five feet high, on the opposite side of the driveway or alley from where the plaintiff was working, and loading it upon a wagon. Beneath every layer of lumber in the pile were crosspieces, which were shorter than the boards in the pile. After removing a layer of boards the man on the pile, one Winkop, threw these crosspieces onto a pile across the alley. Plaintiff was working near the pile of crosspieces. One Collins, who was working on the opposite side of the alley from where the plaintiff was working, saw the plaintiff falling backwards with his hands clasped to his head. A crosspiece, such as was being thrown from the lumber pile over the alley, was lying about six feet from the plaintiff. When the men reached the plaintiff he was found to be unconscious. There was no bleeding

from the nose, ears, or mouth. The plaintiff remained unconscious for hours and was seriously injured. No one saw the plaintiff struck by the crosspiece. There is evidence tending to show that he had been in good health up to this time.

On a former appeal of this case to this court and on motion for a rehearing the case was sent back for a new trial to litigate the rights of the parties under the provisions of ch. 485, Laws 1911. On the second trial the court submitted a special verdict to the jury, who found (1) that plaintiff was struck and injured by a board thrown from a lumber pile by one of defendant's employees; (2) that the method of disposing of the crosspieces was not reasonably adequate to render the place of employment as free from danger as the nature thereof would reasonably permit; (3) that the lack of safety of this method of conducting the work was the proximate cause of the plaintiff's injury; (4) that the plaintiff did not by lack of care on his part proximately contribute to his own injury; and (5) that $3,500 would compensate the plaintiff for the injuries he received.

Judgment was duly entered in accordance with the verdict upon the order of the court for the recovery by the plaintiff of the sum of $3,500, together with the costs and disbursements of the action. From such judgment this appeal is taken.

Allan V. Classon, for the appellant.

For the respondent there was a brief by *Kaftan & Reynolds,* attorneys, and *P. H. Martin,* of counsel, and oral argument by *Mr. Martin* and *Mr. R. A. Kaftan.*

The following opinion was filed February 22, 1916:

SIEBECKER, J. 1. It is held in this case that the finding of the jury to the effect that plaintiff, while in defendant's employ at the place and on the occasion in question, was struck and injured by a board thrown by one of defendant's employees in the course of loading boards from a lumber pile onto a wagon, is sustained by the evidence. The evidence of the

plaintiff and the facts and circumstances of the injury presented an issue for determination by a jury.

2. The second question of the special verdict required the jury to determine whether or not the place where the plaintiff worked at the time of the injury was as free from danger as the nature of the employment would reasonably permit. It appears that the plaintiff was under the supervision of the yard foreman, who directed him to do work at the place where it is alleged he was injured. There is evidence tending to show that plaintiff did not know that crosspieces would be thrown from the lumber pile, of the height of about twenty-five feet, to the place where he was at work. It appears that the employee doing this work threw a number of such crosspieces in the direction of and near the plaintiff without giving any warning. It is also manifest that the conditions of the yard were such that these crosspieces could have been removed from the lumber pile and disposed of in some manner without danger to the plaintiff at the place he was working. The claim that the way adopted was an ordinary and reasonably safe way of conducting this work in view of the surrounding conditions is not sustained. It is manifest that other ways of disposing of these crosspieces could have been adopted which would not have endangered plaintiff's safety, and that the failure to do so justified the jury in concluding that it was dangerous to plaintiff to do the work the foreman directed him to do and that defendant failed to make plaintiff's working place as free from danger as the nature thereof would reasonably permit. The jury's finding on this issue cannot be disturbed.

3. The facts and circumstances showing that the plaintiff did not know that the crosspieces were to be thrown in his direction, that this was done without a proper and sufficient warning to him, and that his foreman directed and permitted him to work in the midst of these dangers, presented an inquiry for a jury as to whether or not plaintiff was guilty of contributory negligence.

4. An exception is urged to the admission of the plaintiff's evidence taken upon the former trial. It appears that plaintiff at the time of this second trial was absent from the state and that he could not appear at the trial to testify. Sec. 4141*a*, Stats. 1915, provides:

"The testimony of . . . any witness who is absent from the state . . . shall be admissible in evidence in any retrial, other action, or proceeding where the party against whom it is offered shall have had an opportunity to cross-examine the said . . . absent witness, and where the issue upon which it is offered is substantially the same."

It appears that the issues raised by the pleadings were identical throughout both trials. Secs. 2837–2839, Stats. 1915. Upon the first trial these issues were tried upon the theory that the rights of the parties were controlled by the rules of law in negligence cases, and on the retrial the same issues were tried under the rules provided by statutes which govern the rights of the parties. The issues of fact raised by the pleadings were unaltered, but the rights growing out of the facts were controlled by statute, which abrogated the common law theretofore applicable to the case. It appears that the plaintiff's evidence taken upon the first trial was as relevant and material to the question being tried on the retrial as it was under the theory of the first trial. The objection that it was error to permit the evidence to be read as it appears in the bill of exceptions on appeal from the judgment rendered in the former trial cannot be sustained. Sec. 4141*a*, Stats. 1915; *Howard v. Beldenville L. Co.* 134 Wis. 644, 114 N. W. 1114. The exceptions urged as to these questions in the case are not well taken.

By the Court.—The judgment appealed from is affirmed.

A motion for a rehearing was denied, with $25 costs, on April 11, 1916.

WISCONSIN CHAIR COMPANY and another, Respondents, vs. INDUSTRIAL COMMISSION OF WISCONSIN and another, Appellants.

February 25—April 11, 1916.

Appeal: Affirmance on equal division.

A judgment of the circuit court reversing an award made by the industrial commission is affirmed, this court being equally divided on the question whether there was sufficient evidence before the commission to give it jurisdiction.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Proceedings under the Workmen's Compensation Act by *Martin Borsenik* against the *Wisconsin Chair Company.* An award made by the *Industrial Commission* was reversed on appeal to the circuit court, and from the judgment of the circuit court the *Industrial Commission* and *Borsenik* bring this appeal.

For the appellant *Industrial Commission of Wisconsin* there was a brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Mr. Messerschmidt.*

For the respondents there was a brief by *Olin, Butler, Stebbins & Stroud,* attorneys, and *Adams, Crews, Bobb & Wescott,* of counsel, and oral argument by *Byron H. Stebbins.*

ROSENBERRY, J. The question presented by the appeal is whether or not there was sufficient evidence before the *Commission* to give it jurisdiction to act in the premises. Chief Justice WINSLOW and Justices MARSHALL and VINJE are of the opinion that there was no such evidence and that therefore the judgment of the circuit court should be affirmed, while Justices SIEBECKER, KERWIN, and the writer are of the opin-

ion that there was such evidence and that therefore the judgment of the circuit court should be reversed and the award of the *Commission* affirmed. This court being equally divided, the judgment of the circuit court is thereby affirmed.

By the Court.—Judgment affirmed.

BALDWIN, Respondent, vs. FRISBIE and another, Appellants.

March 14—April 11, 1916.

Fraudulent conveyances: Husband and wife: Estates of decedents: Creditors' action: Receivers: Rights of widow who colluded in fraud: Reimbursement for debts paid by her: Allowances: Parties: Administrator: Appeal: Dismissal.

1. Where, a few days prior to his death, a husband, without consideration and with intent to defraud his creditors, transferred his real and personal property to his wife, who knew his purpose and colluded with him to carry it out, and his estate was insufficient to pay his debts, judgment was properly entered pursuant to secs. 3835, 3836, Stats. 1915, declaring such transfer void as to creditors of the decedent and subjecting the property to the payment of his debts; and, the administration of the estate having been closed and the administrator discharged, a receiver of said property in the hands of the wife was properly appointed.
2. Although in such case the widow paid some of the debts of the decedent out of her individual estate, her connection with the fraudulent transfer deprives her of all right to reimbursement out of the proceeds of a sale by the receiver of the property so transferred.
3. Having elected not to claim her allowances when the husband's estate was being administered, the widow is not, under the circumstances above stated, entitled to have such allowances made to her out of the property involved in the fraudulent transfer.
4. The administrator of the husband's estate, having been duly discharged, was not a proper party to the creditor's action, and an appeal by him from the judgment setting aside the fraudulent transfer and appointing a receiver is dismissed.

APPEAL from a judgment and an order of the circuit court for Oconto county: W. B. QUINLAN, Circuit Judge. *Affirmed as to one appellant; dismissed as to the other.*

The action was brought to set aside a transfer of real estate and personal property on the grounds of fraud and a total failure of consideration.

In April, 1911, and prior thereto, Marion G. Frisbie, deceased, owned and operated a machine shop at the village of Gillett. In April, 1911, he executed to his wife, *Addie C. Frisbie,* one of the defendants in this action, a quitclaim deed whereby he conveyed all of his real estate and assigned all of his personal property to her for the consideration of "one dollar and other valuable consideration." The real estate so conveyed consisted of the land with a machine shop, and the personal property so assigned consisted of all personal property, including portable sawmill, saw belts, and engine. This quitclaim deed was witnessed and acknowledged and was duly recorded on the 25th day of April, 1911. At this time the deceased was heavily indebted. On April 22, 1911, four days after the execution and delivery of the deed, he died intestate. The defendant *Addie C. Frisbie* had title to the homestead prior to this time. On June 14, 1911, *E. C. Smith* was appointed special administrator of the estate, and on September 13, 1911, he was appointed general administrator and duly qualified as such.

The plaintiff with others presented his claim to the county court against the estate and their claims were duly allowed on September 28, 1912. On September 6, 1913, upon a showing that the estate in the hands of the administrator was insufficient to pay the debts of the intestate and that the administration had been completed, *E. C. Smith,* the administrator, was discharged from his trust.

The defendant *Addie C. Frisbie* received the proceeds of an insurance policy upon the life of her deceased husband amounting to $2,000. She paid about $1,500 out of her separate property to the creditors of her deceased husband, whose claims were not presented against his estate. The real estate conveyed to her by this quitclaim deed had been mortgaged and has been sold, since the husband's demise,

under foreclosure, and a deficiency judgment was entered in the foreclosure suit against *Addie C. Frisbie.*

On March 30, 1914, the court filed findings of fact and conclusions of law, and also denied defendant's motion for a new trial on March 31st. Judgment was awarded and entered on May 4, 1914, setting aside the conveyance and transfer of the property to *Addie C. Frisbie* and appointing a receiver to sell the personal property conveyed to her and apply the proceeds on decedent's debts. On June 1, 1914, the court made an order denying an application of the widow to assign to her the personal property of the deceased then in her possession as and for her support and the support of their minor children during the administration of the decedent's estate in the county court and as and for an allowance as widow of the deceased, and to modify the judgment accordingly, and to vacate that part of the judgment appointing a receiver. From such judgment and order this appeal is taken.

For the appellants the cause was submitted on the brief of *E. C. Smith.*

For the respondent there was a brief by *George Crawford,* and oral argument by *F. M. Wylie.*

SIEBECKER, J. The findings of the trial court are fully sustained by the evidence and cannot be disturbed on this appeal. It is clearly established that the plaintiff was a creditor of the estate of Marion G. Frisbie, deceased; that his claim had been duly allowed against decedent's estate by the county court; that plaintiff and other creditors whose claims have been allowed against the estate by the county court have not received payment of their claims from the administrator of decedent's estate because such administrator had no property of the estate to apply in payment of the same, and that the administration proceedings have been closed and the administrator, *E. C. Smith,* has been discharged from his trust.

The court also found that Marion G. Frisbie conveyed his real and personal property to his wife, the defendant *Addie C. Frisbie,* by quitclaim deed and without consideration a few days prior to his death with the intent to defraud his creditors, and that his wife had knowledge of his intent in making such conveyance and that she colluded with him to carry out such purpose. Upon this state of the case the court properly awarded judgment pursuant to secs. 3835 and 3836, Stats. 1915, declaring this deed of transfer of such property null and void as to the creditors of the deceased and subjecting the property to the payment of the debts of the deceased. In the light of this state of the case the court properly appointed a receiver, with the usual powers and duties, to take possession of the decedent's property in the hands of *Addie C. Frisbie,* subject it to sale, and apply the proceeds of such sale in payment of the debts of the deceased under the direction of the court.

The contention that the widow should in equity be allowed to participate in the proceeds of the sale of this property because she had applied a portion of her individual estate in payment of her husband's debts cannot be sustained. Since she was actively involved in the fraud of her husband she lost all equities that she may have had to participate in this property as one standing in the shoes of the original creditor. *Sommermeyer v. Schwartz,* 89 Wis. 66, 61 N. W. 311; *Bank of Commerce v. Fowler,* 93 Wis. 241, 67 N. W. 423; *Zimmerman v. Bannon,* 101 Wis. 407, 77 N. W. 735. Her connection with the fraudulent transaction deprives her of all claim to any of the property involved in the transaction to reimburse herself for moneys expended by her in reliance on the fraudulent transfer.

Her petition, after judgment in the action, for an allowance out of this property for her support and the support of their minor children during administration of the estate and for a widow's allowance out of her husband's estate, was prop-

erly denied. It appears that she elected not to claim these allowances when the administration of the estate was had in county court. Under the circumstances it must be held that she has not shown any grounds for relief from her election in these matters.

The record shows that the administration proceedings have been closed and that the administrator has been duly discharged from his trust. Under these circumstances the defendant *E. C. Smith,* as administrator, has no interest in this litigation and hence is in no way concerned in the controversies of this action. He is not a proper party to the litigation and the action should have been dismissed as to him. He therefore is not aggrieved by the judgment and is not entitled to appeal therefrom to this court.

The appeal from an order denying the application of the defendant *Addie C. Frisbie* for modification of the judgment and to grant her support and an allowance as widow of Marion G. Frisbie and to vacate the appointment of a receiver as therein determined, presents no additional question to those we have already considered. Upon these considerations it follows that the judgment and the order made after judgment must be affirmed as against the defendant *Addie C. Frisbie,* and that the appeal of *E. C. Smith* as administrator must be dismissed.

By the Court.—It is so ordered.

HORNBURG, Respondent, vs. MORRIS, Appellant.

March 14—April 11, 1916.

Workmen's compensation: Conditions of liability: City employees: Injury while going to work: What are "premises" of employer: Streets: Cause of action against third person: Assignment to employer.

1. Under sec. 2394—3, Stats. 1913, an employee going to or from his employment is not "performing service growing out of and incidental to his employment" except while he is "on the premises of his employer." The rule announced in *Milwaukee v. Althoff*, 156 Wis. 68, is limited accordingly.
2. Where city streets are used by an employee of the city solely for the purpose of going to and from an employment carried on at a definite place other than a street, they are not the "premises of his employer," within the meaning of said statute.
3. A city fireman who was injured while using the streets solely for the purpose above stated had no lawful claim against the city under the Workmen's Compensation Act, and no continued payment of salary during his disability could create a claim against the city or operate as an assignment to it, under sec. 2394—25, Stats. 1913, of any cause of action in tort which he might have against any other party for such injury.

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

Action begun in the civil court to recover damages sustained by a collision with defendant's automobile. Plaintiff was a member of the fire department of the city of Milwaukee. On the 6th of August, 1914, at about 1:50 o'clock in the afternoon, he collided with defendant's automobile while riding a motorcycle near the intersection of Second and Burleigh streets. He was returning to his work after his midday meal and was due at the engine house at 2 o'clock. The evidence showed that for several months after his injury he was unable to work, but that pursuant to a custom or an ordinance of the city he received full pay. The ordinance reads: "Sec. 569. Policemen and firemen shall receive full salary when

injured so as to come under chapter 50 of the Laws of Wisconsin for 1911 and acts amendatory thereof and supplemental thereto."

At the close of plaintiff's testimony the civil court granted a nonsuit because plaintiff came under the Workmen's Compensation Act, and, having received compensation from the city, his claim against defendant, if any, was assigned to it. Upon appeal the circuit court reversed the judgment of the civil court and ordered a new trial on the ground that plaintiff was not injured while in the employ of the city and hence did not come under the Workmen's Compensation Act. From such order the defendant appealed.

For the appellant there was a brief by *Runkel, Runge & McLogan,* attorneys, and *Henry J. Bendinger,* of counsel, and oral argument by *Harry R. McLogan.*

For the respondent there was a brief by *Tibbs, Foster & Schroeder,* attorneys, and *A. W. Foster,* of counsel, and oral argument by *A. W. Foster.*

VINJE, J. In *Milwaukee v. Althoff,* 156 Wis. 68, 145 N. W. 238, it was held that the relation of master and servant under the Workmen's Compensation Act may in some instances extend to places other than the premises of the master where the servant is employed, while he is going to and from work. That was so held under the law as it stood prior to the amendment of ch. 599, Laws 1913, which limited the conditions of liability by this clause: "Every employee going to and from his employment in the ordinary and usual way while on the premises of his employer, shall be deemed to be performing service growing out of and incidental to his employment." [Sec. 2394—3, Stats. 1913.] It is evident that the plaintiff in this case did not come under the act unless the streets of Milwaukee are considered the premises of the city within the meaning of the act. The *Althoff Case* was, impliedly at least, decided upon the assumption that the city streets were not the premises of the master, for reference

was made to the fact that the relation of master and servant might exist beyond such premises while going to and from work. Such relation while going to and from work is now by statute limited to the premises of the employer. Plaintiff was a pipeman and truckman in the fire department of the city and on the day in question he was stationed at the engine house, and was due there at 2 o'clock in the afternoon. In using the streets of the city in going to and from work he used them the same as any employee of a private employer would do. His duty as a fireman did not then call for a use of the streets in any other manner than does the duty of any person who desires to use them in going to and from work. The streets are free to everybody who desires to use them in a lawful manner, and when used solely for the purpose of going to and from work cannot be called the premises of the city within the meaning of the act. That they may in many cases constitute the premises of the city within the meaning of the act is quite obvious; as for instance in the case of an injury to a policeman or fireman while on duty in a street or of a street employee in the performance of his duty thereon. But where the streets are used solely for the purpose of going to and from an employment carried on at a definite place other than a street they are not premises within the meaning of the act. The enactment of the amendment in 1913 must be considered a limitation of the rule announced in the *Althoff Case,* which was decided under the law as it stood previous to the amendment, the injury in that case having occurred on May 3, 1912.

If the relation of master and servant did not exist between plaintiff and the city at the time of injury, then plaintiff had no lawful claim against it the making of which would operate as an assignment to it of his cause of action against the defendant by virtue of sec. 2394—25, which reads:

"The making of a lawful claim against an employer for compensation under sections 2394—3 to 2394—31, inclusive, for the injury or death of his employee shall operate as an as-

signment of any cause of action in tort which the employee or his personal representative may have against any other party for such injury or death; and such employer may enforce in his own name the liability of such other party."

No payment of salary under the ordinance or otherwise could operate to create a claim against the city, where, because of lack of relation of master and servant at the time of the injury, none existed. The only party, if any, liable for the injury to plaintiff was the defendant. That being so, plaintiff's right to maintain the action against him is not transferred to the city by reason of its paying plaintiff's salary while not on duty.

By the Court.—Order affirmed.

IN RE WOOLCOTT.

March 14—April 11, 1916.

Officers de facto: *Judge of county court: Appointment under void statute and under other name: Color of title: Existence of* de jure *officer.*

1. The person appointed as judge of a superior court under a void act of the legislature (ch. 518, Laws 1915) which purported to create such superior court, to vest in it all the powers of a county court, and to abolish the latter court, having, under color of such appointment and the provisions of said act, ousted the *de jure* county judge, taken possession of the county court room, records, and papers, and thereafter exercised all the powers and functions of the county judge, became a *de facto* judge of the county court and his acts as such are valid as to third persons.
2. Neither the fact that said appointee acted under the name of judge of the superior court in exercising the functions of the county court, nor the fact that there was in existence a *de jure* judge of the county court, affects the validity of the acts of such *de facto* judge.
3. There can be no *de facto* officer of an office which does not exist *de jure;* but where there is a *de jure* office there may be a *de*

facto officer thereof even though he was not appointed or elected thereto in the name of such office.

4. *Van Slyke v. Trempealeau Co. F. M. F. Ins. Co.* 39 Wis. 390, and *Fenelon v. Butts*, 49 Wis. 342, distinguished. *Kempster v. Milwaukee*, 97 Wis. 343, explained and language therein qualified.

WRIT of *habeas corpus* issued to test the validity of the commitment of *Erskine Woolcott* to the northern hospital for the insane.

Ch. 518 of the Laws of 1915 purported to create a superior court of Fond du Lac county which should exercise all the functions of the county court thereof and to abolish the latter court. On September 2, 1915, F. W. CHADBOURNE, appointed by the governor as judge of the superior court, demanded possession of the county court room and the records, files, and papers therein from the then duly elected and acting county judge, A. E. RICHTER, who under protest and claiming that he was still county judge delivered up such possession and no longer assumed to act as county judge. Thereafter and until the filing of the decision in *State ex rel. Richter v. Chadbourne* (162 Wis. 410, 156 N. W. 610) on February 22, 1916, declaring void the act creating the superior court and abolishing the county court, Judge CHADBOURNE continued to exercise all the functions of the county court under the name of judge of the superior court of Fond du Lac county. The public recognized such superior court and F. W. CHADBOURNE as judge thereof, and business was transacted in said court by the public until the above mentioned decision was filed. While so acting and on January 3, 1916, after due hearing he adjudged *Erskine Woolcott* insane and ordered him committed to the northern hospital for the insane. That part of ch. 518, Laws of 1915, attempting to confer jurisdiction of the county court upon the superior court reads as follows:

"Section 65. From and after September first, 1915, all of the powers of the county court of Fond du Lac county and

of the county judge shall be and hereby are transferred to and vested in the superior court of Fond du Lac county and its judge.

"Section 66. From and after the first day of September, 1915, the county court of Fond du Lac county shall be and hereby is abolished and the office of the judge of said county court vacated.

"Section 67. All matters and proceedings pending before the county court of Fond du Lac county or the judge thereof on September first, 1915, shall be and hereby are transferred to and vested in the jurisdiction of the superior court of Fond du Lac county and of its judge.

"Section 68. All of the records, files, proceedings and property of the county court of Fond du Lac county on September first, 1915, shall be and hereby are turned over to and vested in the superior court of Fond du Lac county and its judge."

Petitioner claims that Judge CHADBOURNE had no jurisdiction to hear and determine the matter and hence that the commitment is void.

R. L. Morse, for the petitioner.

For the respondent there was a brief by the *Attorney General* and *E. E. Brossard,* assistant attorney general, and oral argument by *Mr. Brossard.*

A brief was also filed by *Doe, Ballhorn, Wilkie & Doe,* as friends of the court, and the cause was argued orally by *H. M. Wilkie.*

VINJE, J. The relator challenges the validity of his commitment to the asylum on the ground that Judge CHADBOURNE was neither a *de jure* nor a *de facto* judge of the county court, and could not be either while purporting to act as judge of the superior court; that he was a mere intruder, and his acts were therefore void and subject to collateral attack. To sustain this position the following cases from our own court are cited: *Van Slyke v. Trempealeau Co. F. M. F. Ins. Co.* 39 Wis. 390; *Fenelon v. Butts,* 49 Wis. 342, 5 N. W. 784; *Kempster v. Milwaukee,* 97 Wis. 343, 72 N. W. 743. Before calling specific attention to these cases it is

deemed best to state the situation in the case at bar. The decision in *State ex rel. Richter v. Chadbourne,* 162 Wis. 410, 156 N. W. 610, established the facts (1) that the county court of Fond du Lac county was not abolished by ch. 518 of the Laws of 1915 and the acts amendatory thereof; (2) that Judge CHADBOURNE ousted the *de jure* judge thereof, took possession of the county court room, records, papers, and files, and from September 1, 1915, continued to exercise all the functions of county judge under the title of judge of the superior court; and (3) that he ousted the county judge under color of title, namely, his appointment as judge of the superior court by the governor of the state and the provisions in ch. 518 that the jurisdiction of the county court was transferred to the superior court. We have therefore the existence of a *de jure* office, the county court, the ousting therefrom, under color of title, of the *de jure* officer thereof, the county judge, by Judge CHADBOURNE, and his exercise of all the functions of the office of the county court under the name of judge of the superior court. County courts were created by the constitution under the name of courts of probate (art. VII, sec. 2), and though under sec. 14, art. VII, the jurisdiction may be transferred to other inferior courts lawfully established, their function cannot be abolished by the legislature. Hence the attempted creation of the superior court and the transfer thereto of the jurisdiction of the county court did not affect the existence of the county court as a *de jure* office. Judge CHADBOURNE's entrance into, and continuance in, such office meets all the requirements of a *de facto* officer as defined by this court in *Ekern v. McGovern,* 154 Wis. 157, 220, 142 N. W. 595, where it said:

"A person may be a *de facto* officer and have no real title at all to the place he assumes to have the right to. If one is in possession of an office, performing its duties, and entered by right *or such claim of right* as not to be classible as a usurper, or have been in undisturbed possession so long as to be equivalent to an entry under claim of right, and still claims in good faith to be entitled to the office, and all sur-

roundings afford an appearance of *de jure* official status,—he is, as a general rule, *de facto* what he claims to be. What gives him that status is color of authority,—color of title is not essential, strictly speaking."

The authorities supporting this definition of a *de facto* officer are collected in the *Ekern Case* and need not be repeated here. In *Norton v. Shelby Co.* 118 U. S. 425, 444, 6 Sup. Ct. 1121, the court uses this language:

"Where an office exists under the law, it matters not how the appointment of the incumbent is made, so far as the validity of his acts is concerned. It is enough that he is clothed with the insignia of the office, and exercises its powers and functions."

The reason for the rule that acts done by a *de facto* officer in a *de jure* office are valid rests upon grounds of public policy. If the contrary were held, official acts of the gravest character would have to be declared void by reason of a defect in the title of the incumbent to the office. Property and personal rights would be subject to constant hazards, arising not out of any infirmity in the procedure settling them, but out of a defect in the title of the official exercising the functions of the office—a defect not in any way logically connected with the proper exercise of the assumed functions. Hence, given a *de jure* office and a *de facto* incumbent thereof, there is a valid exercise of the powers of the office.

The fact that Judge CHADBOURNE acted under the name of judge of the superior court instead of judge of the county court is immaterial. His so acting was under the color of a right conferred by the void acts creating the superior court. Under such color of right he assumed to, and did in fact, exercise all the powers and functions of the county court. That he did not assume the name of the office is due to the fact that he supposed the jurisdiction of the county court was transferred to the superior court and that he was authorized to transact the business of the former court under the title of the latter. There never was any doubt in the minds of either

parties, counsel, court, or the public that Judge CHADBOURNE in acting upon matters under the jurisdiction of the county court did so to the exclusion of the county judge. That is what the void law said he should do and that is what he did. Having taken the substance of the office he is none the less a *de facto* judge though he did not assume its title. The inherent character of an act is not destroyed by a mere change in the form thereof, nor is such character changed by giving it a new name. The functions that belong to an office and not its name determine its identity. *Kirker v. Cincinnati,* 48 Ohio St. 507, 27 N. E. 898.

That there was in existence a *de jure* officer of the county court at the time Judge CHADBOURNE was *de facto* judge thereof does not affect the validity of his acts as a *de facto* judge, he having ousted the *de jure* judge and exercised the functions of the office. *In re Boyle,* 9 Wis. 264; *State v. Bloom,* 17 Wis. 521; *Laver v. McGlachlin,* 28 Wis. 364.

If we analyze the cases in this state referred to as more particularly relied upon by the relator, we find that *Van Slyke v. Trempealeau Co. F. M. F. Ins. Co.* 39 Wis. 390, was a case where under a statute declared to be unconstitutional it was provided that instead of a change of venue upon a disqualification of the circuit judge the parties might stipulate to try the case before a member of the bar of the supreme court, and the validity of a judgment of an attorney so chosen came into question. The court held it void on the ground that there was no *de jure* office which the attorney acting as judge attempted to fill. He did not claim to act as a circuit judge nor attempt to oust him from office. The judgment was therefore *coram non judice.* In *Fenelon v. Butts,* 49 Wis. 342, 5 N. W. 784, it was held that a court commissioner could not lawfully be appointed to exercise jurisdiction in two counties; that a person so appointed was not appointed to any office known to the law and hence could not be a *de facto* officer of any lawful office, and his acts were void. In

both of these cases there was an absence of a *de jure* office. The same is true in *Kempster v. Milwaukee,* 97 Wis. 343, 72 N. W. 743, though the real question there decided was the right of the *de jure* officer to his salary during the time he had been wrongfully excluded from office. The validity of the acts of the alleged *de facto* officer was not in question and was not adjudicated. Language in the opinion to the effect that there was no *de facto* health commissioner must be construed in conjunction with the charter provisions that there was no such office as "acting commissioner of health" in Milwaukee, that being the office to which the alleged *de facto* officer was appointed, and the further charter requirement that the appointment to the office of health commissioner by the mayor must be confirmed by the common council—the appointment in question not having been so confirmed. The court reached the conclusion that since the mayor's appointment was to an office that did not exist, there could be no *de facto* officer of such office. It then goes on to state that "the mere designation of a person, without authority of law, to perform the duties of the office, did not make such person an officer *de facto,* or furnish any justification for payment of the salary incident to the office to such person, that can be pleaded in defense of the claim of the officer *de jure,* made upon his regaining his office." The court was dealing with the question of salary and not with the question of the validity of the acts of *de facto* officers. If there be language in the opinion which can be construed to the effect that, given a *de jure* office, there can be no *de facto* officer thereof unless the appointment or election thereto is *eo nomine* and in all respects regular, it is disapproved and held not applicable to a case involving the validity of the acts of a *de facto* officer.

In *Van Slyke v. Trempealeau Co. F. M. F. Ins. Co.* 39 Wis. 390, 396, the court through RYAN, C. J., quotes approvingly this language from *In re Boyle,* 9 Wis. 264:

"Every person assuming to exercise the authority of an officer, does not thereby make himself an officer *de facto.*

But when it appears that the person exercising the powers of an office, is in by such a color of right, and that he has such possession of the office, as makes him an officer *de facto,* then his acts as to third persons are valid, and his right to hold the office can only be inquired into in some direct proceeding for that purpose."

The cases of *In re Boyle,* 9 Wis. 264; *State v. Bloom,* 17 Wis. 521; and *Laver v. McGlachlin,* 28 Wis. 364, were distinguished from the case then under consideration on the ground that in the cases mentioned the judge held the office under color of title. So in the present case Judge CHADBOURNE held under color of title, had complete possession of the office, room, records, and papers of the county court, an existing *de jure* office, and exercised in full the powers and duties thereof. For that reason he was a *de facto* judge of a *de jure* court and his acts are valid as to third persons.

By the Court.—The writ of *habeas corpus* is quashed.

CONCRETE STEEL COMPANY, Appellant, vs. ILLINOIS SURETY COMPANY, Respondent.

March 14—April 11, 1916.

Contracts for benefit of third persons: Right of action: Building contracts: Bond: Construction: Liability of surety to materialmen: Appeal from civil court: Costs.

1. A contract to pay a debt due to a third person is presumably for his benefit and creates a liability to him unless a contrary intention appears.
2. Where in a building contract the contractor agreed to "provide all the materials," and his bond was conditioned that he should "faithfully perform the contract on his part, and satisfy all claims and demands incurred for the same, and fully indemnify and save harmless the owner from all cost and damage which he may suffer by reason of failure so to do, and shall fully reimburse and repay the owner all outlay and expense which the owner may incur in making good any such default," third persons who furnished materials used in the construction of the building

might enforce payment against the surety in an action on the bond. *Electric A. Co. v. U. S. F. & G. Co.* 110 Wis. 434, and *Yawkey-Crowley L. Co. v. De Longe*, 157 Wis. 390, distinguished.

3. The words "all claims and demands" in the bond include claims and demands for labor and materials, and are not limited by a specific provision in the contract that the contractor should save harmless and indemnify the owner from claims and demands which might be made by reason of any injury to person or property sustained by the contractor or by any person employed by him in connection with the work, or any such injury sustained by any person caused by any act or default of the contractor or any person employed by him, etc.

4. The circuit court may allow motion costs not exceeding $10 on an appeal from the civil court of Milwaukee county.

APPEAL from an order of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Reversed.*

This is an appeal from an order sustaining a demurrer to the plaintiff's complaint. The action was commenced in the civil court of Milwaukee county. The demurrer was overruled by said court and an appeal taken by defendant to the circuit court. In the circuit court the order of the civil court was reversed and the defendant's demurrer to the complaint sustained. From this order of the circuit court sustaining the demurrer the plaintiff appeals to this court.

For the appellant there was a brief by *Lenicheck, Robinson, Fairchild & Boesel,* attorneys, and *Frank T. Boesel,* of counsel, and oral argument by *Frank T. Boesel.*

For the respondent there was a brief by *Flanders, Bottum, Fawsett & Bottum,* and oral argument by *Arnold C. Otto* and *R. N. Van Doren.*

KERWIN, J. The cause of action set forth in the complaint was founded upon a bond executed by the defendant as surety for one James W. Utley, which bond is set forth in the complaint. The bond was executed by Utley and said defendant as surety to secure the performance of a contract entered into between said Utley and Edw. Schuster & Co. for the erection of a building for said Edw. Schuster & Co. by

Utley as principal contractor. The contract is set out in the complaint.

The complaint alleges that plaintiff was employed by Utley under an agreement to furnish certain materials consisting of steel bars to be used in the construction of a building to be erected by Utley for said Edw. Schuster & Co. under the contract referred to; that plaintiff furnished said materials and the same were used in and about said building by Utley, and that there is due plaintiff on account of said materials so furnished a balance amounting to $1,830.05; that in furnishing said materials to Utley plaintiff relied upon the credit of the bond executed by the defendant herein as surety for its claim; that the execution and delivery of the bond was a condition precedent to the granting of said building contract to Utley by Edw. Schuster & Co.

The main contention of appellant here is that the defendant, *Illinois Surety Company,* is liable to a materialman who furnished material to the principal contractor, which material was used in the construction of the building in question. This contention is based upon the promise contained in the bond to pay claims incurred in the construction of the building.

The rule is well settled in this court that "when a person for a consideration paid to him by another agrees to pay, or cause to be paid, a sum of money to a third person, a stranger to the transaction, the latter thereby immediately becomes possessed of the absolute right to the benefit of the promise and a right of action thereby accrues to him against the promisor." *Tweeddale v. Tweeddale,* 116 Wis. 517, 93 N. W. 440; *Wetutzke v. Wetutzke,* 158 Wis. 305, 148 N. W. 1088.

The question arises in the instant case whether third parties furnishing material used in the construction of the building can enforce payment in an action against the defendant surety on the bond.

The contract between Utley, contractor, and Edw. Schuster

& Co., among other things provides that Utley will "provide all the materials." The bond given by the defendant to secure the performance of the contract between Utley and Edw. Schuster & Co. for the construction provides:

"The condition of this obligation is such that if the principal shall faithfully perform the contract on his part, and satisfy all claims and demands incurred for the same, and fully indemnify and save harmless the owner from all cost and damage which he may suffer by reason of failure so to do, and shall fully reimburse and repay the owner all outlay and expense which the owner may incur in making good any such default, then this obligation shall be null and void; otherwise it shall remain in full force and effect."

We think the instant case is ruled by *Warren Webster & Co. v. Beaumont H. Co.* 151 Wis. 1, 138 N. W. 102; *R. Connor Co. v. Ætna Ind. Co.* 136 Wis. 13, 115 N. W. 811; and *U. S. G. Co. v. Gleason,* 135 Wis. 539, 116 N. W. 238.

In *Warren Webster & Co. v. Beaumont H. Co., supra,* the bond was conditioned "that if the construction company should duly perform the contract with the hotel company for furnishing the material and performing the labor agreed upon, and 'shall duly and promptly pay and discharge all indebtedness that may be incurred in carrying out and completing said contract, and save said building and the Beaumont Hotel Company free and harmless from all mechanics' liens and claims of liens, or other claim or expenses by reason thereof, then this obligation shall be void,' otherwise to remain in full force and effect." The court said:

"Under such circumstances, third parties furnishing labor and material obtain the benefit of such indemnity, and they can enforce their rights in all respects as if they had been parties to the contracts and bonds. The rights and liabilities of the principal contractors, the sureties, and the persons furnishing material and labor within the terms of the transactions covered by the construction contracts and bonds have on several occasions recently been considered in this court and need no further amplification here." Page 10.

In *R. Connor Co. v. Ætna Ind. Co., supra,* the bond of indemnity provided for the performances of all the several stipulations in the contract and to pay for all labor and material that had entered into the construction of the building.

It is true in the case at bar there is no express mention in the bond of labor and material, but the provisions of the bond, "satisfy all claims and demands incurred for the same," are broad enough to cover claims and demands incurred for labor and material.

In *U. S. G. Co. v. Gleason, supra,* at page 546 this court said:

"Since, then, the bond here in question secures the persons who furnished materials used in the construction of the county's buildings, it follows that plaintiffs, who furnished material so used and for which the principal contractor has not paid, have the right to enforce payment under the bond by action directly against the bondsmen. This right is well established, though they had no knowledge of the promise when made or had not expressly assented thereto before bringing the action, and the right to enforce such contract for their benefit continues while the bond is in force."

The defendant surety company, respondent here, relies mainly upon two Wisconsin cases, namely, *Electric A. Co. v. U. S. F. & G. Co.* 110 Wis. 434, 85 N. W. 648, and *Yawkey-Crowley L. Co. v. De Longe,* 157 Wis. 390, 147 N. W. 334. The first of these cases is distinguished in *R. Connor Co. v. Ætna Ind. Co.* 136 Wis. 13, 115 N. W. 811, and other cases in this court and shown not in point in the instant case. The *Yawkey-Crowley Case* is clearly distinguishable. In that case neither in the contract nor in the bond was there any agreement to pay for labor or material or satisfy all claims and demands. At page 396 of 157 Wis. this court said, quoting from *Lenz v. C. & N. W. R. Co.* 111 Wis. 198, 86 N. W. 607:

"The insufficiency in the bond under consideration in that case was that it did not require or promise any payment to

the materialmen seeking to enforce it, merely protection to the obligee party; hence, of course, there was no apparent intent to benefit the materialmen."

Some criticism as to the form of the bond is made by respondent's counsel which we think unwarranted. The bond in effect provides, first, that "the principal shall faithfully perform the contract on his part;" second, "and satisfy all claims and demands incurred for the same;" third, "and fully indemnify and save harmless the owner from all costs and damages which he may suffer by reason of failure so to do;" fourth, "and shall fully reimburse and repay the owner all outlay and expense which the owner may incur in making good any such default."

It is argued that in order to create a liability to plaintiff here the contract must be intended for its benefit. Under the decisions of this court if the contract be to pay a debt due to a third person, presumably it is for his benefit unless it appears that the contract was not so intended. There is nothing in the record in the instant case which tends to show that the contract was not intended for the benefit of those having lawful claims for labor or material. *Tweeddale v. Tweeddale,* 116 Wis. 517, 93 N. W. 440; *U. S. G. Co. v. Gleason,* 135 Wis. 539, 116 N. W. 238; *R. Connor Co. v. Ætna Ind. Co.* 136 Wis. 13, 115 N. W. 811; *Warren Webster & Co. v. Beaumont H. Co.* 151 Wis. 1, 138 N. W. 102; *Electric A. Co. v. U. S. F. & G. Co.* 110 Wis. 434, 85 N. W. 648; *Johnston v. Charles Abresch Co.* 123 Wis. 130, 101 N. W. 395.

It is further argued by counsel for respondent that the words "claims and demands" in the bond are limited by the contract, which specifically provides that the contractor shall save harmless and indemnify the owner from claims, injuries, and demands which may be made by reason of any injury to person or property sustained by the contractor or by any person employed directly or indirectly by him in connection with the work, and any injury to person or property sustained by

any person caused by any act or default of the contractor or of any person employed by him, and also pay all royalties and save the owner harmless, and further provision respecting the waiver of right to liens except on certain conditions.

It is quite obvious that these provisions were inserted in the contract not for the purpose of narrowing the general meaning of the words "claims and demands" used in the bond, but extending the meaning to liabilities which might be thought not covered by the general language.

The provision in the bond to satisfy all claims and demands manifestly includes claims and demands for labor and material, which are the principal claims and demands incurred in building contracts.

Counsel for appellant insists that the order appealed from is erroneous because the court imposed absolutely, and not as terms or condition to amend, $10 costs. But the $10 costs imposed in the circuit court on appeal from the civil court were not terms on amendment under sec. 2686, Stats., but costs on motion under sec. 2924, Stats., therefore it was within the power of the court to impose such costs. The $10 imposed absolutely by the order in the circuit court were costs allowed in that court on the appeal. Civil Court Act, ch. 549, Laws 1909; *Pennsylvania C. & S. Co. v. Schmidt,* 155 Wis. 242, 144 N. W. 283; *Winternitz v. Schmidt,* 161 Wis. 421, 154 N. W. 626; sec. 2924, Stats.

It follows that the order appealed from must be reversed.

By the Court.—The order is reversed, and the cause remanded for further proceedings according to law.

MILWAUKEE BUILDING SUPPLY COMPANY and another, Respondents, vs. ILLINOIS SURETY COMPANY, Appellant, and others, imp., Respondents.

March 14—April 11, 1916.

Building contracts: Bond of contractor: Liability of surety to materialmen: Payments by owner without release of liens, etc.: Discharge of surety: Liens: Notices: Address and service: Corporations having identical interests: Claims for liens: Naming of owner: Sufficiency.

1. *Concrete S. Co. v. Illinois S. Co., ante,* p. 41, as to direct liability of the surety on the bond of a building contractor to laborers and materialmen, followed.
2. A provision in a building contract that payments shall not become due unless at the time of payment the contractor, "if so required," shall deliver to the owner a satisfactory release of all liens, is not violated so as to discharge the surety on the contractor's bond by the making of payments by the owner without requiring such release of liens.
3. Where in such case the bond contained a waiver clause providing that any alterations which might be made in the terms of the contract, or the giving by the owner of any extension of time for performance, or any other forbearance on the part of either the owner or the principal to the other, should not in any way release the principal or the surety from their liability on the bond, payments by the owner without requiring a release of liens or a statement "of all persons furnishing material or labor . . . to whom a lien is given by law," did not so violate sub. 3, sec. 3315, Stats., as to discharge the surety from liability.
4. A bond issued by a surety company to secure faithful performance of a building contract is essentially an insurance contract.
5. A finding of fact to the effect that, because a corporation for which a building was being erected owned all the stock of the corporation which had title to the land and because of the relation of the two companies, service of the lien notices required by sec. 3315, Stats., on either of said companies, however addressed, gave the required notice to both companies, is *held* to be sustained by evidence showing, among other things, such ownership of the stock, that the companies were in interest substantially the same company, that the president of one was vice-president of the other, and that the assistant secretary of one was bookkeeper for the other.

6. The notices, under said statute, may be served upon the "owner or his agent," and need not be addressed to any one.
7. Under the facts above stated, claims for liens naming only the corporation having title to land were sufficient, under sec. 3320, Stats., as a basis for liens against the interest of the other company also.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

This action was brought to foreclose subcontractors' liens for materials furnished in the erection of a store building for defendant *Edw. Schuster & Co.* upon land to which title was in defendant *Schuster Realty Company,* situate in the city of Milwaukee, and for recovery of personal judgment against the defendants J. W. Utley, principal contractor, and *Illinois Surety Company,* surety upon Utley's bond. The plaintiffs and all the defendants except *Illinois Surety Company, Schuster Realty Company, Edw. Schuster & Co.,* J. W. Utley, and Simon W. Strauss are materialmen; said Strauss being mortgagee of the premises under a mortgage executed subsequently to the commencement of the construction of the building.

The plaintiffs and other subcontractors claim to have perfected rights to materialmen's liens, and a right of recovery against the defendant *Illinois Surety Company* as surety upon the bond of Utley for the full performance of his contract for the construction of the building, regardless of whether or not their rights as lien claimants were perfected.

The defendants *Edw. Schuster & Co.* and *Schuster Realty Company* contend that liens were not in all cases perfected and that as to such as were perfected they claim a right of recovery against the *Illinois Surety Company.*

The *Illinois Surety Company* contends that claims for lien were not established because of the failure of the lien claimants to perfect their claims by the service of notices required by sec. 3315, Stats., and insufficiencies in the petitions for liens, and as to three of such lien claimants no right of lien

existed because the material furnished or labor performed was not within the provisions of the lien statutes. It further claims that there was no direct liability by it to the materialmen under its bond, but that it was liable only, if at all, as indemnitor to *Edw. Schuster & Co.*, and that as to all claims not perfected as liens it had sustained no liability. It also maintained that as to all claims, whether perfected as liens or not, it was relieved from liability as surety to *Edw. Schuster & Co.* because of the failure of the latter company to protect itself from such claims by the exercise of its contract right and duty to withhold payments from the principal contractor until such claims were discharged, and because of the failure and neglect of said *Edw. Schuster & Co.* to demand of Utley the verified statements of the names of all persons furnishing material or labor under the building contract as required by sec. 3315, Stats.

The defendant J. W. Utley did not appear and judgment was rendered against him by default, from which he has not appealed.

Simon W. Strauss, as trustee, did not answer, and the judgment determined that his mortgage interest was subsequent to that of the lien claimants, and no appeal has been taken from that part of the judgment.

As to all the other defendants, namely, J. W. Utley, Ferdinand Pietsch, John Eller Lumber Company, a corporation, Simon W. Strauss as trustee, Waterproofing Company of America, a corporation, Midland Terra Cotta Company, a corporation, Charles Cowalksy, H. F. Pazik, assignee of Mike McCracken, Math. Schiszler, Hans Lochen, and Chas. Gauger, the court denied relief either by personal judgment against *Illinois Surety Company* or foreclosure of liens, and none of said defendants has appealed.

The defendants *Western Lime & Cement Company, Wisconsin Lakes Ice & Cartage Company, Janesville Sand & Gravel Company,* and *Moody Transfer Company* were awarded judgment upon their claims directly against *Illinois*

Surety Company, but were denied right to liens because of their failure to perfect their right to liens as required by sec. 3315, Stats., and none of said defendants has appealed.

All other claimants were adjudged to have perfected liens against the property of *Edw. Schuster & Co.* and of *Schuster Realty Company,* with judgment of foreclosure of such liens, and were each awarded personal judgment upon their claims against *Illinois Surety Company.* The *Illinois Surety Company* only has appealed.

For the appellant there were briefs by *Flanders, Bottum, Fawsett & Bottum,* attorneys, and oral argument by *R. N. Van Doren, C. F. Fawsett,* and *Arnold C. Otto.*

For the respondents *Milwaukee Building Supply Company* and *Waukesha Lime & Stone Company* there was a brief by *Marshutz & Hoffman,* attorneys, and *J. H. Marshutz,* of counsel; for the respondent *Buestrin Construction Company,* a brief by *L. J. Brabant,* attorney, and *Marshutz & Hoffman,* of counsel; and the cause was argued orally by *J. H. Marshutz.*

G. J. Davelaar, for the respondent *Kies.*

For the respondent *Worden-Allen Company* the cause was submitted on the brief of *J. O. Carbys.*

For the respondents *Meyers Brothers* there was a brief by *Churchill, Bennett & Churchill,* and oral argument by *W. H. Churchill.*

For the respondents *Nehls* and *Vogt* there was a brief by *Froede & Bodenstab,* and oral argument by *H. H. Bodenstab.*

For the respondent *M. Hilty Lumber Company* the cause was submitted on the brief of *Connell & Weidner.*

For the respondent *Cream City Sand Company* the cause was submitted on the brief of *Lorenz & Lorenz.*

Edgar L. Wood, for the respondent *Pennsylvania Coal & Supply Company.*

For the respondent *American 3-Way Prism Company* the cause was submitted on the brief of *Otto Dorner.*

Henry V. Kane, for the respondent *Wisconsin Lakes Ice &*

Cartage Company, adopted the brief of the respondent *American 3-Way Prism Company.*

William Kaumheimer, for the respondent *Ed. Schuster & Co., Inc.*

For the respondent *Western Lime & Cement Company* the cause was submitted on the brief of *Lawrence A. Olwell.*

For the respondent *Janesville Sand & Gravel Company* the cause was submitted on the brief of *Samuel M. Field* and *Carl F. Geilfuss.*

For the respondent *Phillip Gross Hardware Company* the cause was submitted on the brief of *N. L. Baker & W. J. Zimmers.*

For the respondent *Lake Shore Stone Company* the cause was submitted on the brief of *Harold W. Connell.*

For the respondent *American Bureau of Inspection & Tests* there was a brief by *Lenicheck, Robinson, Fairchild & Boesel,* and oral argument by *F. T. Boesel.*

Edgar J. Patterson, for the respondent *Duffus,* adopted the briefs presented by the other respondents.

KERWIN, J. The assignments of error in this case are grouped by appellant and argued under six heads and we shall treat them in the same order.

1. The first assignment of error treats the proposition whether the bond in question creates a direct liability of the surety to laborers and materialmen. The bond considered in this case is the same bond treated and passed upon in *Concrete Steel Co. v. Illinois Surety Co., ante,* p. 41, 157 N. W. 543. The decision in that case as to direct liability of the surety to the laborers and materialmen controls this case.

2. The second, third, and fourth assignments of error raise the question whether the surety was discharged by acts subsequent to the execution of the bond.

J. W. Utley was the principal contractor and *Illinois Surety Company,* appellant here, surety on his bond given to secure

Edw. Schuster & Co. Under the contract *Edw. Schuster & Co.* were required to retain ten per cent. out of each payment for the final payment to be made within sixty days after the completion of the work. It is contended by appellant that this was not done, hence the surety was discharged.

On this point the findings of the court below, supported by the evidence, are against the appellant. It appears from the evidence that the architect in making his certificates in all cases before the final certificate deducted ten per cent. in substantial compliance with the contract.

It is further contended by counsel for appellant under this head that payments were made to Utley before the same were due, in violation of the contract and sec. 3315, Stats.; that *Edw. Schuster & Co.* disregarded the contract and the statute in making such payments. The provision of the contract referred to is to the effect that payments shall not become due unless at the time of payment the contractor, "if so required," and in any event at the time of final payment, shall deliver to the owners a satisfactory release of all liens against the premises. The final payment had not been made at the time of trial.

Nor was there any violation of sec. 3315, Stats., when construed in connection with the contract and bond, which bond contains the following waiver:

"And provided, that any alterations which may be made in the terms of the contract, or in the work to be done under it, or the giving by the owner of any extension of time for the performance of the contract, or any other forbearance on the part of either the owner or the principal to the other, shall not in any way release the principal and the surety or sureties, or either or any of them, their heirs, executors, administrators, successors, or assigns, from their liability hereunder, notice to the surety or sureties of any such alteration, extension, or forbearance being hereby waived."

This waiver clause authorized alteration of the contract and the facts show alteration authorized by the waiver. *Cow-*

dery v. Hahn, 105 Wis. 455, 81 N. W. 882; *Kunz v. Boll,* 140 Wis. 69, 121 N. W. 601; 2 Corp. Jur. 1165, 1166.

This court has held that contracts of a paid surety have the features of an insurance contract. *United Am. F. Ins. Co. v. American B. Co.* 146 Wis. 573, 131 N. W. 994; *Whinfield v. Massachusetts B. & I. Co.* 162 Wis. 1, 154 N. W. 632.

3. The fifth, sixth, seventh, and eighth assignments of error relate to an alleged waiver of breach of the contract between *Edw. Schuster & Co.* and Utley which appellant claims occurred by acts and doings of *Edw. Schuster & Co.* We shall not treat this contention or decide the question involved, because we are convinced that the waiver clause in the bond, before referred to, authorized the acts which appellant complains constituted a breach of the contract in question.

4. The ninth assignment of error attacks the finding of the court below to the effect that *Edw. Schuster & Co.,* under contract between it and the *Schuster Realty Company,* agreed to keep the building free from liens which it contracted to erect for the *Schuster Realty Company.* This finding seems to be amply supported by the evidence and cannot be disturbed.

5. The tenth assignment of error attacks the tenth finding of fact, which in substance finds that because *Edw. Schuster & Co.* owned all the capital stock of the *Schuster Realty Company* and by reason of the relation of such companies service of the notices required by sec. 3315, Stats., on either of said companies, however addressed, gave the notice required by said statutes to both companies. We think this finding is supported by the evidence. *Edw. Schuster & Co.* and *Schuster Realty Company* were in interest substantially the same company. *Edw. Schuster & Co.* in fact owned *Schuster Realty Company* by virtue of ownership of all its stock. Albert T. Friedman was president of *Edw. Schuster & Co.* and vice-president of *Schuster Realty Company.* Max Friedman was vice-president of *Edw. Schuster & Co.* and Frank E. Genens assistant secretary of *Edw. Schuster & Co.* and bookkeeper for *Schuster Realty Company.* The statutory notices under

sec. 3315 were served upon the above named parties by respondents who filed liens. It will be observed that this statute requires notice to be served upon the "owner or his agent" and does not require the notice to be addressed to the owner; simply requires that "written notice to the owner or his agent" shall be given. Notice to any officer in either *Edw. Schuster & Co.* or *Schuster Realty Company* under sec. 3315, in view of their relations to each other, was sufficient to give notice to both companies. *Haynes v. Kenosha E. R. Co.* 139 Wis. 227, 119 N. W. 568, 121 N. W. 124; *Milbrath v. State,* 138 Wis. 354, 120 N. W. 252; *Fernekes v. Nugent Sanitarium,* 158 Wis. 671, 149 N. W. 393.

6. Assignments of error 11 to 33, inclusive, relate mainly to alleged insufficiency of claims of subcontractors as liens by reason of failure to serve the statutory notices and insufficiencies in the petitions for liens.

We have before referred to the fact that service on an officer or agent of either *Edw. Schuster & Co.* or *Schuster Realty Company* was good service on either company. It was not necessary that the notice should be addressed to any one. It is sufficient without any title or address or if defectively entitled or addressed. *W. H. Pipkorn Co. v. Evangelical L. St. Jacobi Soc.* 144 Wis. 501, 504, 129 N. W. 516. It is further insisted under this head that as to some claims, even if notices were sufficient, no liens were established because of failure to file claims for liens against *Edw. Schuster & Co.,* the principal objection being that the claims for lien named *Schuster Realty Company* only, except that of *Buestrin Construction Company,* which names "Edw. Schuster Realty Company." It is contended that such claims filed did not comply with sec. 3320, Stats., which requires the claim for lien to state the "name of the person against whom the demand is claimed," because the name *Edw. Schuster & Co.* as owner was not stated. What has already been said we regard sufficient on this point.

Other findings of fact are attacked by appellant, but we do

not regard the contentions tenable. We think all the findings of fact are supported by the evidence and that the findings support the judgment.

It seems that full costs in this court should not be allowed to defendants and respondents, but that the plaintiffs and respondents should have full costs.

By the Court.—The judgment of the court below is affirmed. Full costs may be taxed in favor of plaintiffs and respondents. Costs to defendants and respondents are limited to $10 attorney fees and disbursements to each who has filed a brief.

MAHONEY, Respondent, vs. KURTH, imp., Appellant.

March 15—April 11, 1916.

Fraudulent conveyances: Evidence: Mortgages: Foreclosure: Deficiency: Unconscionable judgment.

1. A finding by the trial court that a conveyance by a mortgagor to his sister, after the commencement of a foreclosure action, of certain property not covered by the mortgage was without consideration and made with intent to defraud his creditors and particularly the mortgagee, is *held* to be sustained by the evidence.
2. Where mortgaged property was sold on foreclosure for less than the amount due and the mortgagee had judgment for a deficiency, the mere fact, found by the trial court, that at the time of the sale the property was of sufficient value to satisfy the mortgage and unpaid taxes does not show, in the absence of any evidence of overreaching or fraud on the part of the mortgagee, that a judgment afterwards obtained by him against a fraudulent transferee of other property of the mortgagor was unconscionable.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

On June 4, 1909, the plaintiff commenced an action for the foreclosure of a mortgage against the defendant Herman Kurth. The property described in the mortgage was sold

and a judgment for deficiency rendered against the defendant Herman Kurth on March 31, 1911. On June 23, 1909, the defendant Herman Kurth conveyed certain real and personal property to his sister, *Paulina Kurth.* Execution was issued against Herman upon the deficiency judgment, and the sister, *Paulina,* was summoned in garnishment proceedings. Issue was joined upon the answer of the garnishee, and upon the trial the conveyance made by Herman to *Paulina* was adjudged to be void in fraud of creditors and plaintiff had judgment. The garnishee, *Paulina,* appeals therefrom.

For the appellant there were briefs by *William F. Schanen,* attorney, and *James D. Shaw,* of counsel, and oral argument by *Mr. Shaw.*

Alfred Klingelhoefer, for the respondent.

ROSENBERRY, J. The principal facts in the case are not in serious dispute. Appellant contends that at the time of the making of the conveyance from Herman to his sister, *Paulina,* Herman was entirely solvent, did not convey all of his property, and that the property described in the mortgage was of ample value to satisfy the same; that there was no fraudulent intent, and that there was a valuable consideration for the conveyance.

The court found that the conveyance from Herman to *Paulina* was without consideration and made for the purpose and with the intention of injuring, hindering, delaying, and defrauding the creditors of Herman, particularly the plaintiff in this action.

Sec. 2323, Stats., makes the question of fraudulent intent, in cases such as this, one of fact and not of law. There is nothing to indicate that the trial court did not apply the correct rules of law in arriving at the conclusion which he did upon the facts; therefore the findings must stand as verities unless this court can say upon the evidence that they are clearly wrong. We have carefully examined the evidence and

cannot disturb the findings. A detailed discussion of the facts would serve no useful purpose.

Appellant contends that the judgment is unconscionable for the reason that the trial court found that at the time of the foreclosure the property described in the mortgage was of sufficient value to satisfy the mortgage together with all taxes chargeable against the property. There is no evidence in this case of any overreaching by the plaintiff, and nothing to show that the defendants or either of them were in any way misled by the plaintiff. The obligation to pay and discharge the mortgage was that of the defendant Herman, and if the property described therein was of sufficient value to discharge the mortgage it was his duty to see that it was so applied, and in the absence of any evidence of overreaching or fraud on the part of plaintiff we think the claim that the judgment was unconscionable is without merit.

By the Court.—Judgment affirmed.

MONTAGUE and others, Appellants, vs. THE STATE and another, Respondents.

March 15—April 11, 1916.

Taxation: Inheritance taxes: Transfers by appointment made after passage of law, under power previously created: Transfers resulting from failure to appoint.

1. The inheritance tax, being a tax upon the transfer or devolution of property or the right of succession thereto, and not a tax upon the property itself, may be properly levied upon a transfer which becomes effective by appointment after the passage of the law under a power previously created.
2. The principle above stated applies to a case where the appointment must be made from a class, as well as to a case where the power is a general one.

3. The provision in sub. (5), sec. 1087—1, Stats., that a transfer resulting from the failure of the donee of the power to appoint shall be deemed to constitute a taxable transfer equally with a transfer resulting from an appointment, is valid because the failure to act equally affects the course of the succession, and until such failure is complete the succession is not fully determined.
4. The proviso in sub. (4), sec. 1087—1, Stats., excepting estates vested before the act and contingent interests created by will before the act, does not apply to estates or property created by appointment under sub. (5).

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

This was a proceeding commenced by appellants by petition in the county court of Milwaukee county to determine whether certain property received by them was subject to the payment of inheritance taxes. The facts were that in 1874 Robert H. Cabell, the grandfather of the appellants, conveyed to certain trustees fifteen city lots in Milwaukee, reserving a life estate in himself, and creating a life estate at his death in his daughter Virginia (appellants' mother), and giving her power to distribute and devise said lots by will in such manner and proportions as she might choose among her children living at her death, and, in case of default in the exercise of such power, directing the trustees to convey the lots to such surviving children in equal shares, and, if there were no such children, to the heirs at law of the grantor. Cabell died in 1875, leaving a will in which he confirmed the deed of trust. Virginia, the life tenant, died in December, 1913, leaving four daughters surviving (the appellants), having executed a will, afterwards duly probated, by which she exercised her power of appointment as to a part of said lots, of the aggregate value of $220,478.28, and did not exercise the power as to the remainder of the lots, of the value of $31,100.

The inheritance tax law, in force at the time of the death of the life tenant, is found in secs. 1087—1 to 1087—24, Stats. 1913. Sec. 1087—1 is the only section important in

this case, and it provides for the imposition of a tax upon all transfers of property to any person or corporation, with certain exceptions, in the following cases: (1) when the transfer is by will or by the state intestate laws on the death of a resident; (2) the same as to a nonresident so far as property within the state or within its jurisdiction is concerned; (3) when the transfer is by deed or grant made in contemplation of death, either by resident or nonresident (provided in the latter case that the property be within the state or its jurisdiction); (4) when such person or corporation becomes "beneficially entitled, in possession or expectancy, to any property or the income thereof, by any such transfer whether made before or after the passage of this act; provided, that property or estates which have vested in such persons or corporations before this act shall take effect, shall not be subject to a tax; and provided further, that contingent interests created by the will of any person who died prior to the passage of this act shall not be taxed; (5) whenever any person or corporation shall exercise a power of appointment derived from any disposition of property, made either before or after the passage of sections 1087—1 to 1087—24, inclusive, such appointment, when made, shall be deemed a transfer taxable under the provisions of sections 1087—1 to 1087—24, inclusive, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of sections 1087—1 to 1087—24, inclusive, shall be deemed to take place to the extent of such omission or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

The county court of Milwaukee county imposed an inheritance tax upon the entire property, and, the judgment being affirmed by the circuit court, the petitioners appealed.

Charles E. Wild, attorney for the appellants and guardian *ad litem* for minor appellants.

For the respondents there was a brief by the *Attorney General, E. E. Brossard,* assistant attorney general, and *John Harrington,* inheritance tax counsel; and the cause was argued orally by *Mr. Brossard* and *Mr. Harrington.*

WINSLOW, C. J. The following propositions are decided in this case:

1. The inheritance tax, being a tax upon the transfer or devolution of property or the right of succession thereto, and not a tax upon the property itself, may be properly levied upon a transfer which becomes effective by appointment made after the passage of the law under a power previously created, for the reason that the transfer does not become complete until the appointment is made and at that time the law is in effect. *Matter of Dows,* 167 N. Y. 227, 60 N. E. 439; *Matter of Cooksey,* 182 N. Y. 92, 74 N. E. 880; *Minot v. Treasurer,* 207 Mass. 588, 93 N. E. 973; *State ex rel. Smith v. Probate Court,* 124 Minn. 508, 145 N. W. 390.

2. The principle just stated applies to a case where, as here, the appointment must be made from a class, as well as to a case where the power is a general one. *Matter of Dows, supra; Burnham v. Treasurer,* 212 Mass. 165, 98 N. E. 603.

3. The provision that a transfer resulting from the failure of the donee of the power to appoint shall be deemed to constitute a taxable transfer equally with a transfer resulting from an appointment, is valid because the failure to act equally affects the course of the succession, and until such failure is complete the succession is not fully determined. *Burnham v. Treasurer, supra.*

4. The proviso in sub. (4) of sec. 1087—1, Stats., excepting estates vested before the act and contingent interests created by will before the act, does not apply to estates or property created by appointment under sub. (5), because it seems clear that by sub. (5) the legislature intended to deal sep-

arately with property or estates created by appointment and to cover that subject completely, hence that an exception contained in another subsection which has ample scope for operation elsewhere is not to be imported into it.

By the Court.—Judgment affirmed.

HEATH, Appellant, vs. CUPPEL, Administratrix, Respondent.

March 15—April 11, 1916.

Infants: Contract to adopt: Specific performance: Lost contract: Evidence: Sufficiency.

1. To warrant enforcement of specific performance of a contract of adoption where the writing alleged to have contained the contract is lost, the evidence to establish it must be clear, satisfactory, and convincing.
2. In such cases the facts must not only be consistent with performance of such a contract, but must also be such that they cannot reasonably be harmonized with any other theory.
3. A letter written by one C., after marriage with plaintiff's mother, to a boarding-house keeper with whom plaintiff, then ten years old, was boarding, stating that the mother would shortly call for him to bring him to C.'s home and that C. would adopt him as his own son, was no more than a declaration of an intention to adopt the plaintiff; and the facts that plaintiff's mother afterwards brought him to their home, that he was received and treated by C. as a son, and that he lived there until he attained his majority, do not establish a contract of adoption, in the absence of any direct proof that such a contract was in fact made between C. and plaintiff's mother, who was the only person who could contract for him in the matter.
4. The facts above stated being entirely consistent with the idea that plaintiff became and remained a member of C.'s household as a stepson, and the conduct of all the parties during his residence there and afterwards up to the time of C.'s death being in harmony with that idea and tending strongly to disprove the existence of a contract for his adoption, an action to enforce specific performance of such a contract was properly dismissed.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

The action was brought for a specific performance of an

alleged agreement of adoption of the plaintiff by Charles Cuppel, deceased, and to enforce plaintiff's rights in the estate of Charles Cuppel, deceased, under such agreement.

The plaintiff was born in 1860 near Tilton, New Hampshire. In July, 1866, his mother married Charles Cuppel, deceased, and thereafter resided with him as his wife in the county of Milwaukee. In July, 1870, the deceased wrote to one Mrs. Ames, in New Hampshire, a boarding-house keeper with whom plaintiff was living, stating that the plaintiff's mother would call for him to bring him to Milwaukee and that the deceased would adopt plaintiff as his son. This letter has been lost or destroyed. Plaintiff's mother called for plaintiff in New Hampshire and brought him to Milwaukee in 1870. Plaintiff took the name of Willie Cuppel (although he was sometimes called *Heath*) and lived at the home of deceased and wife in Milwaukee as one of the family. The deceased supported the plaintiff and sent him to school until he was seventeen years of age. The family then moved to a farm and conducted a milk business and plaintiff worked on the farm and delivered milk. Plaintiff and the deceased did not get along well together and their relations became strained to a degree that when plaintiff was twenty-two years of age he left the Cuppel home because of serious differences with the deceased. When plaintiff finally departed for the West he dropped the name of Cuppel and was known as *William Heath*. He remained in the West for several years and married during this time. Cuppel knew nothing of his whereabouts nor of his marriage. In 1894 the plaintiff lost his home and property in the West through a fire, and with financial aid from the deceased he returned to the home of the Cuppels in Milwaukee county with his family. The deceased furnished a house for him free of charge and also furnished the necessaries to plaintiff's family and paid plaintiff some money for his services. In 1896 plaintiff and the deceased had a disagreement involving the marriage of Charles Cuppel, Jr., a young man whom the deceased had taken as a

foundling and brought up as a member of his family. Plaintiff left the farm and never returned to it again and thereafter saw the deceased only once for about an hour at decedent's office; nor did he return at the time of his mother's death in 1901.

In 1903 the deceased married the defendant, *Agnes Cuppel,* and he died in April, 1911. The deceased owned real estate at the time of his death appraised at $32,700 with the exception of the homestead. The evidence tends to show that the homestead has a market value of $65,000. He also had $11,502.36 worth of personal property. The estate was duly probated and the real estate assigned to his widow as his heir. Due publication of notice as to creditors was given. Plaintiff attempted to file a claim against the estate for services, but it was not filed within the time fixed for filing claims against the estate and hence was disallowed by the court.

The trial court found as facts: "That about the month of July, 1870, said Cuppel [deceased] wrote a letter to Mrs. Ames, the boarding-house keeper with whom the plaintiff was boarding in New Hampshire, stating that his mother would shortly call for him to bring him to Milwaukee and that said Cuppel would adopt the plaintiff as his own son; that said letter has been lost or destroyed; that all of plaintiff's rights against Cuppel are based on this letter;" also that "when plaintiff lived at the Cuppel home he relied on Cuppel's letter and expected to be adopted, but plaintiff knew from and after he left Milwaukee and went West, from the relations existing between him and Charles Cuppel and from other facts and circumstances connected with his residence with Charles Cuppel, that said Cuppel would not adopt him as a son."

The court held that plaintiff had established no ground for a specific performance of a contract of adoption and entered judgment dismissing the complaint. From such judgment this appeal is taken.

James F. Dougherty, attorney, and *Charles E. Hammersley*

and *F. R. Bentley,* of counsel, contended, *inter alia,* that a written or oral obligation by a person to adopt the child of another as his own, accompanied by a virtual though not a statutory adoption, and acted upon by all parties concerned for many years and during the obligor's life, will be enforced in equity upon the death of the obligor by decreeing the child entitled as a child to a child's share in the property of the obligor. 1 Cyc. 936; 1 Corp. Jur. §§ 17–19, 21, pp. 1376–1378. The following are examples of cases where the court has held that a written contract to adopt, though falling short of the statutory requirements, will be enforced: *Burns v. Smith,* 21 Mont. 251, 53 Pac. 742; *Chehak v. Battles,* 133 Iowa, 107, 110 N. W. 330; *Healey v. Simpson,* 113 Mo. 340, 20 S. W. 881; *Sharkey v. McDermott,* 91 Mo. 647, 4 S. W. 107; *Herrick's Estate,* 124 Minn. 85, 144 N. W. 455; *Middleworth v. Ordway,* 191 N. Y. 404, 84 N. E. 291; *Furman v. Craine,* 18 Cal. App. 41, 121 Pac. 1007; *Winne v. Winne,* 166 N. Y. 263, 59 N. E. 832; *Anderson v. Blakesly,* 155 Iowa, 430, 136 N. W. 210; *Horton v. Troll,* 183 Mo. App. 677, 167 S. W. 1081. The following are cases where oral contracts to adopt have been sustained and the adopted child given a child's share in the estate of the deceased: *Dilger v. Estate of McQuade,* 158 Wis. 328, 148 N. W. 1085; *Lynn v. Hockaday,* 162 Mo. 111, 61 S. W. 885; *Godine v. Kidd,* 64 Hun, 585, 19 N. Y. Supp. 335; *Crawford v. Wilson,* 139 Ga. 654, 78 S. E. 30; *Thomas v. Malone,* 142 Mo. App. 193, 126 S. W. 522; *Hespen v. Wendeln,* 85 Neb. 172, 122 N. W. 852; *Kofka v. Rosicky,* 41 Neb. 328, 59 N. W. 788; *Peterson v. Bauer,* 83 Neb. 405, 119 N. W. 764; *Brasch v. Reeves,* 124 Minn. 114, 144 N. W. 744. See, also, *Murtha v. Donohoo,* 149 Wis. 481, 134 N. W. 406, 136 N. W. 158. Notwithstanding the fact that the letter in this case has been lost and no copy of the same could be produced at the trial, the court will consider it a sufficient proof of a writing to charge the promisor with its performance. *Roehl v. Haumesser,* 114 Ind. 311, 15 N. E. 345; *Anderson v. Anderson,* 75 Kan. 117,

88 Pac. 743; *Dillon v. Gray,* 87 Kan. 129, 123 Pac. 878; *Dilger v. Estate of McQuade,* 158 Wis. 328, 148 N. W. 1085.

For the respondent there was a brief by *Quarles, Spence & Quarles,* attorneys, and *J. V. Quarles,* of counsel, and oral argument by *J. V. Quarles.* They argued, among other things, that if there had been a contract of adoption it could have been enforced during Cuppel's lifetime. 1 Cyc. 935; *Sandham v. Grounds,* 94 Fed. 83; *Carroll's Estate,* 219 Pa. St. 440, 68 Atl. 1038; *Kauss v. Rohner,* 172 Pa. St. 481, 33 Atl. 1016; *Pollock v. Ray,* 85 Pa. St. 428; *Graham v. Graham's Ex'rs,* 34 Pa. St. 475. The measure of damages is not the value of the share of the promisor's estate which would have been inherited by the child, but the value of services performed or outlay incurred on the strength of the promise, with interest. 1 Corp. Jur. § 26, p. 1378; *Sandham v. Grounds,* 94 Fed. 83. The alleged agreement to make plaintiff an heir is unenforceable. *Ellis v. Cary,* 74 Wis. 176, 42 N. W. 252; *Estate of Kessler,* 87 Wis. 661, 59 N. W. 129; *Martin v. Estate of Martin,* 108 Wis. 284, 84 N. W. 439; *Rodman v. Rodman,* 112 Wis. 378, 88 N. W. 218; *Loper v. Estate of Sheldon,* 120 Wis. 26, 97 N. W. 524; *Taylor v. Thieman,* 132 Wis. 38, 111 N. W. 229. This principle is also supported by many of the courts outside of this state, among which are the following: *Albring v. Ward,* 137 Mich. 352, 100 N. W. 609; *Bowins v. English,* 138 Mich. 178, 101 N. W. 204; *Wallace v. Rappleye,* 103 Ill. 229; *Daily v. Minnick,* 117 Iowa, 563, 91 N. W. 913; *Wyley v. Bull,* 41 Kan. 206, 20 Pac. 855; *Hill v. Hill,* 121 Ind. 255, 23 N. E. 87; *Farnham v. Clements,* 51 Me. 426; *Horton v. Stegmyer,* 175 Fed. 756; *Hale v. Hale,* 90 Va. 728, 19 S. E. 739; *Gould v. Mansfield,* 103 Mass. 408; *Harder v. Harder,* 2 Sandf. Ch. 17; *Wallace v. Long,* 105 Ind. 522, 5 N. E. 666; *Austin v. Davis,* 128 Ind. 472, 26 N. E. 890, 12 L. R. A. 120.

SIEBECKER, J. It is contended that the court erred in awarding judgment dismissing plaintiff's complaint upon the

findings in the case. The basis of this contention is that the contents of the letter written by Charles Cuppel, deceased, in 1870 to Mrs. Ames, with whom plaintiff was then living with the consent of his mother, and the entry by plaintiff into the family of deceased and receiving the support, care, and education of a son until he departed therefrom after arriving at the age of majority, under the circumstances heretofore stated constitute an adoption agreement. It is fundamental to the specific performance of a contract of adoption, where the writing relied on as containing the contract is lost, that the evidence adduced to establish it must be clear, satisfactory, and convincing in its probative force. In such cases the facts must not only be consistent with performance of such a contract, but must also be such that they cannot reasonably be harmonized with any other theory. *Wales v. Holden,* 209 Mo. 552, 108 S. W. 89. Applying these rules to the case before us, it is manifest that the trial court properly dismissed the plaintiff's complaint. The facts found by the court do not establish a contract of adoption. The contents of the letter as established are in their most favorable aspect no more than a declaration by Charles Cuppel, deceased, that he intended to adopt plaintiff. This, however, is no more than a personal declaration that he had determined to adopt him, and fails to show that a contract of adoption had in fact been made with plaintiff's mother, the only person who could contract for plaintiff in this matter. The evidence in the case discloses nothing in the nature of direct proof that a contract of adoption had ever been consummated between deceased and his wife, the plaintiff's mother. The only evidentiary facts bearing on the subject are that plaintiff's mother, subsequent to the writing of the letter, brought him from New Hampshire to their home, that deceased received plaintiff into his home and treated him as a son while residing there, and that plaintiff lived there in that capacity until he attained his majority. This course of events is perfectly harmonious with the idea that plaintiff became a member of decedent's house-

hold as a stepson. It was natural that after plaintiff's mother became the wife of the deceased she would desire to have her son cared for and nurtured in her household and that the husband and stepfather acceded to this, having in contemplation the fact that he would adopt him. These facts and circumstances fail to establish that the mother and stepfather at any time consummated an agreement for his adoption and that plaintiff pursuant thereto entered the family and rendered the services to the deceased. The conduct of plaintiff, his mother, and the decedent, from the time plaintiff entered their family in 1870 to the time of decedent's death in 1911, strongly negatives the claim that such a contract existed. The facts and circumstances are very persuasive to the effect that plaintiff at no time prior to decedent's death understood that his stepfather had made an agreement for adopting him and that he was in fact the adopted son. The evidence tending to show that the deceased regarded the plaintiff as an adopted son is meager and unconvincing. His treatment of plaintiff during his minority and providing for him as he did is more in harmony with the treatment that a stepfather under like circumstances bestows on a stepson. These conditions also refute the contention that the court erred in not finding an express contract of adoption, as plaintiff claims. The facts found by the court contain every ultimate fact sustained by the evidence and embraced in the issues raised. An attentive and exhaustive study of the evidence has led us to the conclusion that the trial court's findings are as favorable to the appellant as the evidence will permit and that the exceptions thereto are not well taken. It is considered that the evidence fails to establish the alleged contract of adoption and hence plaintiff is not entitled to any relief in the case. There is no reversible error in the record, and the judgment of the circuit court must be sustained.

By the Court.—The judgment appealed from is affirmed.

STATE EX REL. LANGLAND, Appellant, vs. MANEGOLD and others, Respondents.

March 15—April 11, 1916.

Constitutional law: County offices created after adoption of constitution: Appointment by governor.

In ch. 402, Laws 1915,—providing for a board of administration in counties of 250,000 inhabitants or more to manage and control certain county institutions,—the provision that two of the five members of such board shall be appointed by the governor of the state does not contravene sec. 9, art. XIII, Const. The members of the board, being officers whose offices have been created by law subsequent to the adoption of the constitution, may, as provided in said section, "be elected by the people or appointed, as the legislature may direct."

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

The appeal is from an order sustaining a general demurrer to plaintiff's complaint.

Paul D. Carpenter, attorney, and *Charles W. Stark, Jr.,* of counsel, for the appellant.

For the respondents there was a brief by *Winfred C. Zabel,* district attorney, *William L. Tibbs,* special assistant district attorney, and *Daniel W. Sullivan,* assistant district attorney, and oral argument by *Mr. Tibbs* and *Mr. Sullivan.*

ROSENBERRY, J. This action was one in the nature of *quo warranto* to test the constitutionality of ch. 402, Laws 1915 as amended. The act in question is entitled "An Act to repeal [certain sections and creating certain other sections], to provide for a board of administration in counties of two hundred and fifty thousand inhabitants or more to manage and control the county almshouse, the hospital for destitute sick persons, the poor farm, county waterworks, department for outdoor relief, hospital for insane, asylum for chronic insane, home for

dependent children, and the school of agriculture and domestic science; and providing a penalty."

Sec. 2 of the act provides that in the counties specified and under the conditions enumerated the county board "shall elect by ballot three persons and the governor shall appoint two persons to act, and be known as a board of administration, and shall have charge of such county hospital, county poor farm," etc. It prescribes their qualifications, how vacancies shall be filled, that they shall take a prescribed oath, and the manner in which they may be removed and by whom.

The duties of the board of administration are substantially those imposed upon the county trustees created by ch. 94, Laws 1905, the constitutionality of which was sustained in *State ex rel. Busacker v. Groth,* 132 Wis. 283, 112 N. W. 431. The provision of ch. 402, Laws 1915, providing that two members of the board of administration may be appointed by the governor is said to contravene the provisions of sec. 9, art. XIII, of the constitution of this state, which is as follows:

"All county officers whose election or appointment is not provided for by this constitution shall be elected by the electors of the respective counties, or appointed by the boards of supervisors or other county authorities, as the legislature shall direct. All city, town and village officers whose election or appointment is not provided for by this constitution shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose. All other officers whose election or appointment is not provided for by this constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people or appointed, as the legislature may direct."

It is plain that the members of this board are officers whose offices have been created by law subsequent to the time of the adoption of the constitution, and therefore may be "elected by the people or appointed, as the legislature may direct." The office is one not mentioned in the constitution and not in existence at the time of the adoption of the constitution, but is an

entirely new office, the duties and functions of which can scarcely be said to have had any existence at the time of the adoption of the constitution except in a rudimentary form. The makers of the constitution left to the legislature the power to meet changing conditions by the enactment of statutes creating new county officers and prescribing their duties and the manner in which they should be elected or appointed. The provisions of this act by which the power of appointing two members of the board of administration is vested in the governor of the state seems to be not only within the spirit but within the exact letter of the constitution. *State ex rel. Williams v. Samuelson,* 131 Wis. 499, 111 N. W. 712; *State ex rel. Gubbins v. Anson,* 132 Wis. 461, 112 N. W. 475; *Income Tax Cases,* 148 Wis. 456, 134 N. W. 673, 135 N. W. 164.

By the Court.—Order affirmed.

TORREY, Appellant, vs. RIVERSIDE SANITARIUM, Respondent.

March 15—April 11, 1916.

Private sanitarium: Duty as to restraint of patients: Escape: Frightening other person: Liability: New trial: Newly discovered evidence.

1. It is the duty of a private sanitarium and its employees at all times during the treatment of nervous and insane patients to use such means to restrain and guard them as would seem reasonably sufficient to an ordinarily prudent man under like circumstances to prevent them from escaping and injuring others; and for breach of that duty liability will arise, if such breach proximately causes injury to another.
2. No breach of the duty above stated was shown in this case, it appearing, among other things, that the patient in question never exhibited symptoms of violence; that he came to defendant's sanitarium (a private one) voluntarily and was apparently normal and entirely tractable; that, at the time of his escape, which

occurred while he was being transferred from a lower to an upper floor, there was a male attendant at his side; and that an attempt to place greater restrictions on his liberty might easily have resulted in exciting him and producing serious results.

3. A motion for a new trial on the ground of newly discovered evidence may properly be denied where such evidence would add nothing to the case.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

Personal injuries. The following facts appeared on the trial: The defendant is a corporation maintaining a private sanitarium for the treatment of persons afflicted with nervous and mental diseases or drug habits in the village of East Milwaukee, the building being about three blocks from the house of the plaintiff. On November 16, 1913, the defendant received as an inmate one Ralph Kennan, a young man twenty-eight years of age, on the request of Dr. A. W. Gray, who was Kennan's medical adviser. During the forenoon of that day and prior to receiving the patient, Dr. Studley, the defendant's general superintendent, received information from Dr. Gray as to Kennan's general condition to the effect that he seemed to be in a confused state of mind, and had certain obsessions of a bodily character, principally to the effect that his heart was weak and that his stomach was going to fall out of the anterior abdominal wall. Dr. Gray further told Dr. Studley that these obsessions had existed for two days, that there had been no occasion to suspect mental aberration before that time, but that he wanted the patient under observation to determine whether his mental condition was a mere brain trouble or the result of some acute disease like typhoid fever coming on. During the afternoon of that day the patient voluntarily came to the institution accompanied by a male relative. He gave his own history to Dr. Studley, described the ideas which he had, and appeared to be normal and unusually intelligent. Dr. Studley made a physical and neurological examination of the patient and caused him to be

put to bed in a room in the so-called observation department, where the doors are not locked and where active mental cases are not kept, and gave directions as to his diet and as to hydrotherapeutic and massage treatments. Both day and night nurses, of which there were several in the department, were directed to converse with him frequently and report anything strange or peculiar which he said or did. On the 17th the patient seemed to the nurse to be perfectly normal in his conversation, cheerful, and gentle. Dr. Studley visited and talked with him several times that day. About midnight of that day he got up and dressed and left the institution without permission and without the knowledge of the night nurse, went down town to the city of Milwaukee, and returned at about 6 o'clock a. m. on the morning of the 18th. When Dr. Studley was informed of this at about 9 o'clock a. m. he visited the patient, who was in bed, and talked with him a time. No details of the midnight trip are given, but it does not appear that the patient's conduct or conversation was violent or abnormal during the trip or afterwards. Dr. Studley, after talking with the patient, determined to transfer him from his room on the ground floor to a department on the second floor called the men's hall, where the windows are guarded with screens so as to prevent escape. Dr. Studley told the patient that he wished to prevent any recurrence like that and that he desired to transfer him to another department, to which the patient assented without objection, and said "all right." He got out of bed, and with his underclothes on and a blanket thrown over him was conducted by a bath attendant from his room up a stairway toward the men's hall. He seemed to go with perfect willingness. Dr. Studley followed them along the corridor to the foot of the stairway and then proceeded towards his office. The patient and attendant walked side by side upstairs, and as they entered the large hall of the men's department into which the individual rooms opened the patient suddenly threw off the blanket, of which the attendant

had hold, ran down-stairs pursued by the attendant, dashed through the hall, into his former room, out of the window, and onto the ground. Dr. Studley was still in the hall when Kennan ran down, but not at the foot of the stairs. Kennan ran across the fields and came to the plaintiff's dwelling house, where the plaintiff was alone with two small children under three years of age, and demanded to use the telephone so he could telephone his uncle in Milwaukee. He then asked for some clothes. The plaintiff got him into a bedroom and told him he would find some of her husband's clothes there, and then took one of her children and ran for the front door of the house, where she met the attendant from whom Kennan had escaped and two female nurses in pursuit. Kennan escaped from the house through a window and ran three or four more blocks, when he stopped and told the attendant he would go back, and was taken back to the institution. On the following day Kennan was received into the Milwaukee hospital for the insane as a voluntary patient, where he remained until March 30, 1914, when he was discharged with his condition much improved. There was testimony tending to show that as a result of the shock and fright the plaintiff was afflicted with neurasthenia and cystitis.

The jury returned the following special verdict:

"(1) Did the defendant exercise ordinary care while transferring Ralph Kennan from room No. 2 to the men's hall? *A.* No.

"(2) If you answer first question 'No,' then: Was such want of ordinary care the proximate cause of plaintiff's injury? *A.* Yes.

"(3) What sum will reasonably compensate the plaintiff for the injuries she received? *A.* $1,000."

The trial court on motion changed the answer to the first question from "No" to "Yes" and to the second question from "Yes" to "No," and rendered judgment for defendant, from which plaintiff appeals.

Charles E. Hammersley, attorney, and *C. H. Van Alstine,*

of counsel, for the appellant, cited, among other cases, *Richardson v. Dumas,* 106 Miss. 664, 64 South. 459; *Broz v. Omaha M. & G. H. Asso.* 96 Neb. 648, 148 N. W. 575; *Wetzel v. Omaha M. & G. H. Asso.* 96 Neb. 636, 148 N. W. 582; *Duncan v. St. Luke's Hospital,* 113 App. Div. 68, 98 N. Y. Supp. 867, affirmed in 192 N. Y. 580, 85 N. E. 1109; *University of Louisville v. Hammock,* 127 Ky. 564, 106 S. W. 219.

For the respondent there was a brief by *Schmitz, Wild & Gross,* and oral argument by *E. J. Gross.*

WINSLOW, C. J. Doubtless it is incumbent on the defendant and its employees at all times during the treatment of nervous and insane patients to use such means to restrain and guard them as would seem reasonably sufficient to an ordinarily prudent man under like circumstances to prevent such an occurrence as took place here, and for breach of that duty liability will arise, if such breach proximately causes injury to another. *University of Louisville v. Hammock,* 127 Ky. 564, 106 S. W. 219.

The trial court held that the evidence would not justify a finding of breach of that duty in the present case, and we cannot say that this conclusion was wrong.

The evidence has been quite fully stated and will not be repeated. It is to be remembered that the patient in question never exhibited symptoms of violence; that he came to the institution voluntarily and was apparently normal and entirely tractable; that at the time of his escape there was a male attendant at his side; that an attempt to place greater restrictions on his liberty might easily have resulted in exciting the patient and producing serious results; and further that the defendant is a private institution receiving voluntary patients and not a public institution receiving patients upon legal commitment. There are probably no questions more delicate than the questions arising as to the proper care of such pa-

tients; humanity demands that they be treated and cared for somewhere, but it cannot demand omniscience in that treatment. The same measures may produce the best results in some cases and the worst in others. The evidence impresses us with the belief that the defendant's employees were performing an exceedingly difficult task with all the care and caution which ordinarily prudent persons in their situation would deem it necessary to exercise.

A motion for new trial on the ground of newly discovered evidence was properly overruled. In our judgment the evidence referred to would have added nothing to the case against the defendant.

By the Court.—Judgment affirmed.

TROJANOWSKI, Administratrix, Appellant, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent.

March 16—April 11, 1916.

Railroads: Fences: Entry of adult upon right of way: Lack of fence at street crossing: Injury, when "occasioned" thereby: Liability: Statutes construed.

1. A finding by the jury that the death of an adult who entered upon defendant's right of way at a street crossing and while walking along the railroad was struck and fatally injured by a passenger train was occasioned in whole or in part by the want of a wing fence on the line of the street, is *held* to be sustained by evidence showing, among other things, that in going upon the right of way the deceased used a well-beaten footpath which crossed the line on which a wing fence was required by sec. 1810, Stats.; that such path had for many years been used daily by large numbers of pedestrians; that defendant's agents and servants had full knowledge of such use and acquiesced therein; that no fence, guard, or other structure had been erected to divert this travel or give notice to the public to keep off the railroad; and that the deceased took the course which pedestrians usually followed in traveling along the tracks.

2. Under the circumstances stated the deceased was not a trespasser nor was his conduct in going upon and walking along the railroad such a deliberate, wanton, and reckless action that his death is to be considered as the result of a wilful exposure to known danger for which no recovery can be had.
3. Even if, in walking along the tracks, the deceased violated sec. 1811, Stats. 1911, that fact did not defeat the right to recover damages for his death, such right in cases within sec. 1810 being independent of the penal provision of sec. 1811.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Reversed.*

The action is for damages for the benefit of the widow of Felix Trojanowski, deceased, who was struck by one of defendant's trains and died from the injuries he sustained.

The decedent was fifty-seven years of age and a laborer by occupation and resided in the city of Milwaukee. He lived a short distance from where Fifteenth avenue intersects the defendant's right of way. Fifteenth avenue extends north and south and the railroad right of way crosses it in an easterly and westerly direction. Fifteenth avenue is carried over the right of way by an overhead bridge. The Forest Home cemetery fence borders on the west margin of the avenue. A well-defined footpath on the avenue near the cemetery fence extends from a point about two blocks north of the railway tracks to the right of way and then extends westerly on the right of way. The evidence shows that this path has been in existence for a period exceeding twenty years and has been in constant daily use by pedestrians, who traveled over the path and the railroad right of way to and from Fifteenth avenue and Twenty-second street to the west and the surrounding factories and business establishments. There are several factories in this district and this path was used by the factory employees, also by school children and by others traveling in that vicinity. Witnesses testify that a number of people, as high a number as 200, used this path on the right of way daily. The evidence of the railroad employees

and agents shows that it was well known to them and to defendant's representatives that this path existed and was used daily by hundreds of pedestrians. There was no wing fence nor cattle-guard or other barrier at this crossing to prevent or divert travelers from going onto and using the right of way as a footpath.

In February, 1913, intestate went upon defendant's right of way at this place and continued thereon in a westerly direction until he met a freight train coming from the east on the south track. Intestate then stepped to the north side of both tracks. The heavy smoke from the locomotive of the freight train seems to have obscured his view so that he did not see a passenger train coming from the west on the north track and he was struck and severely injured, which resulted in his death.

The court submitted a special verdict to a jury, who found (1) that the death of Felix Trojanowski was occasioned in whole or in part by the want of a wing fence at the west line of Fifteenth avenue where the same crosses the defendant's right of way, and (2) assessed the plaintiff's damages at the sum of $2,500. The court set aside the jury's answer to the first question and ordered judgment dismissing plaintiff's complaint. From such judgment this appeal is taken.

For the appellant there was a brief by *John C. Kleczka* and *Glicksman, Gold & Corrigan,* and oral argument by *Mr. Kleczka* and *Mr. Walter D. Corrigan.*

Edward M. Smart, for the respondent.

There was also a brief by *W. A. Hayes,* as *amicus curiæ.*

SIEBECKER, J. The plaintiff asserts that the defendant is liable for the damages she suffered by the death of Felix Trojanowski under the provisions of sec. 1810, Stats. 1911, providing for the erection and maintenance of fences and cattle-guards on railroads. Sub. 2 of this statute provides:

"Until such fences and cattle-guards shall be duly made

every railroad corporation owning or operating any such road shall be liable for all damages done to cattle, horses or other domestic animals, or persons thereon, occasioned in any manner, in whole or in part, by the want of such fences or cattle-guards; . . ."

As appears by the foregoing statement, the jury found by special verdict that the death of Trojanowski was occasioned in whole or in part by the want of a wing fence at the west line of Fifteenth avenue where it crosses defendant's road. The trial court set aside this finding on the ground that the evidence does not permit of the inference "that there was some causal connection between absence of the fences and the death of plaintiff's intestate." The object and purpose of such fences and guards has been adverted to in the decisions of this court. *Blair v. M. & P. du C. R. Co.* 20 Wis. 254; *Schwind v. C., M. & St. P. R. Co.* 140 Wis. 1, 121 N. W. 639; *Ulicke v. C. & N. W. R. Co.* 152 Wis. 236, 139 N. W. 189; *Atkinson v. C. & N. W. R. Co.* 119 Wis. 176, 96 N. W. 529. In the *Atkinson Case,* where claim was made for the loss of a horse, in speaking of this statute the court states:

"It is said by RYAN, C. J., in *Curry v. C. & N. W. R. Co.* 43 Wis. 676, that of course the open gate does not *cause* the injury to the horse; but the statute does not require this as a condition of the liability; merely that the result shall be occasioned by the absence of or defect in the fence, and that the injury from a train suffered by an animal which enters by means of such opening is occasioned thereby;" and further states that "The railway company is subjected to the duty of fencing not alone for the benefit of the adjoining owner but of the public at large."

In the *Schwind Case* it is said:

"The purpose of this statute was to cast upon the railroads absolute liability for injuries to cattle whose entry upon the tracks was made possible by absence of the prescribed fences, and when it was amended in the revision of 1878 by the addition 'persons,' *the extension of the same purpose to human beings was obvious.*"

This case also shows that proximate causal relation and contributory negligence are not involved in a case within this statute.

"An injury may well be occasioned in whole or in part by the absence of a fence, although it may not be proximately caused thereby. It is enough if such omission gives occasion for entry on the place of injury." *Randall v. M., St. P. & S. S. M. R. Co.* 162 Wis. 507, 156 N. W. 629.

In speaking of the object of the legislature in enacting this statute Mr. Justice BARNES in the *Ulicke Case* states:

"It has also recognized the shortcomings and propensities of the ordinary run of human beings and has provided an additional safeguard against their dangerous habit of walking along railroad tracks, by requiring that such tracks be fenced. . . . This statutory requirement is in the interest of preserving human life and limb and should not receive any interpretation that would tend to weaken it, unless it is apparent that such interpretation was clearly within the legislative contemplation."

The foregoing cases do not pass upon the claim of an adult person for injuries which were occasioned while traveling on a railroad where the entry was made over a place requiring a fence or a cattle-guard. The plaintiff in the case of *Alexander v. M., St. P. & S. S. M. R. Co.* 156 Wis. 477, 146 N. W. 510, drove onto the track under circumstances which showed that the team of horses he was driving entered the railway right of way either because he lost control of them or because of plaintiff's intoxicated condition, and hence he was held not to be guilty of such a deliberate and intentional entry on the railroad which in law constitutes such a wanton and reckless action that any injuries occasioned thereby are considered to be the result of a wilful exposure to a known danger for which the law affords no remedy. The question is, Does the conduct of the decedent in going onto the railroad and walking thereon, in the light of the facts and circum-

stances, show that he was guilty of such deliberate, wanton, and reckless action that the plaintiff is in law not entitled to recover the damages she suffered by decedent's death? The jury found that the death of the deceased was occasioned in some manner, in whole or in part, by the want of a wing fence at the west line of Fifteenth avenue where it crosses defendant's railroad. The trial court set this finding aside as not supported by the evidence, relying on *Bejma v. C. & M. E. R. Co.* 160 Wis. 527, 149 N. W. 588, 152 N. W. 180, and *Smith v. C. & N. W. R. Co.* 161 Wis. 560, 154 N. W. 623. In the *Bejma Case* the original entry by the plaintiff on the railroad at a place where the required fence was omitted was held not to have occasioned the second entry thereon at a different place where no fence was required, because it was obvious that he would have made the second entry regardless of the first and that Bejma's injuries were therefore wholly occasioned by the second entry on the railroad. The *Smith Case* turned on the point that the want of the required headlight on the approaching engine, which struck plaintiff while he was walking on the depot platform, had no causal connection with the collision, because the vicinity of the accident was so brilliantly lighted by electric lights that the required headlight would not have appreciably added to the illumination nor would it have aided plaintiff in observing the approaching engine.

The facts of this case show that the place of entry on the defendant's railroad at the crossing had been used by the public about twenty-nine years; that it was used daily by a large number of men, women, and children; that the number of such pedestrians was as high as two hundred and over on some days; that the defendant's agents and servants had full knowledge thereof and acquiesced therein; that there was a well-beaten footpath along the west side of Fifteenth avenue for over a block from the railroad which was daily used by the

pedestrians; that it passed over the fence line onto the track, and that no fence, guard, or other physical structure was erected or maintained by the railroad company to intercept or divert this travel from the railroad or give notice to the public to keep off from it. Under such circumstances it has been held in this and other courts that the pedestrians using the footpath on the railroad are not trespassers. *Townley v. C., M. & St. P. R. Co.* 53 Wis. 626, 11 N. W. 55; *Whalen v. C. & N. W. R. Co.* 75 Wis. 654, 44 N. W. 849; *Davis v. C. & N. W. R. Co.* 58 Wis. 646, 17 N. W. 406; *Delaney v. M. & St. P. R. Co.* 33 Wis. 67; *Johnson v. Lake Superior T. & T. Co.* 86 Wis. 64, 56 N. W. 161; *Anderson v. C., St. P., M. & O. R. Co.* 87 Wis. 195, 58 N. W. 79.

Considering the condition presented to the deceased at the time he approached the railroad in connection with the open way and the well-beaten traveled path and the constant use of it by the public generally, can it be said that his entry onto the railroad was not in part occasioned thereby? The maintenance of the required fence and cattle-guard at the place in question would naturally have operated to divert the travel from the track. As heretofore stated, "It is enough if such omission gives occasion for entry on the place of injury." *Schwind v. C., M. & St. P. R. Co.* 140 Wis. 1, 121 N. W. 639. Under these conditions the inference of the jury that decedent's entry on the railroad was in some manner in whole or in part occasioned by the want of the fence is warranted, and the court erred in setting aside their finding in the special verdict on this issue. It appears that the travel on the track customarily proceeded from the place of entry thereon to the place of collision with the deceased and that he took the course pedestrians usually followed in traveling thereon. This shows that the relationship between decedent and defendant had not changed from the time he entered on the railroad to the time of collision.

It is urged that the deceased violated the provisions of sec. 1811, Stats. 1911, and hence the plaintiff could not be permitted to recover for his death. This court, speaking on this subject in *Ulicke v. C. & N. W. R. Co.* 152 Wis. 236, 139 N. W. 189, recently declared:

"The requirement to fence would serve very little purpose in so far as it pertained to persons if it were held that the plaintiff in this case could not recover because of the legislative inhibition against walking on railway tracks."

We are of the opinion that the legislature did not intend to defeat the right of recovery by an injured person conferred by sec. 1810, Stats. 1911, by subjecting him to the penalties of sec. 1811. The right to collect damages in cases within sec. 1810 is independent of the penal provision of sec. 1811.

It is considered that the court erred in changing the jury's answer to the first question in the special verdict and that the plaintiff is entitled to have the jury's answer thereto restored, and upon the verdict as rendered the plaintiff is entitled to judgment against the defendant for the amount of the damages assessed therein.

By the Court.—The judgment appealed from is reversed, and the cause is remanded for further proceedings and for judgment as indicated in this opinion.

PRELLWITZ, Respondent, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant.

March 16—April 11, 1916.

Street railways: Injury to passenger alighting from car: Negligence of conductor and motorman: Special verdict: Inconsistency: Excessive damages.

1. In an action for injuries sustained in alighting from a street car, findings by the jury that the conductor and the motorman were each guilty of a want of ordinary care in starting the car are not inconsistent, there being evidence that the motorman was negligent in suddenly starting the car and that the conductor was negligent in giving the signal to start before plaintiff had alighted.
2. An award of $3,200 for serious injuries to a school teacher, caused by the sudden starting of a street car from which she was alighting, is *held* not so excessive as to show that the jury was actuated by passion or prejudice.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Action to recover for personal injuries. There was a verdict and judgment for plaintiff and defendant appealed. The jury returned the following verdict:

"(1) Was the defendant's car suddenly started from a state of rest while the plaintiff was in the act of alighting therefrom? *A.* Yes.

"(2) If you answer the first question 'Yes,' did the defendant, in so starting such car, fail to exercise ordinary care? *A.* Yes.

"(3) If you answer the first question 'Yes,' was the defendant's conductor guilty of a want of ordinary care in starting said car? *A.* Yes.

"(4) If you answer the first question 'Yes,' was the defendant's motorman guilty of a want of ordinary care in starting said car? *A.* Yes.

"(5) If you answer the second question 'Yes,' was such failure to exercise ordinary care the proximate cause of plaintiff's injuries? *A.* Yes.

"(6) Did any want of ordinary care on the part of the plaintiff proximately contribute to plaintiff's injuries? *A.* No.

"(7) At what sum do you assess the plaintiff's damages? *A.* $3,200."

The contention of appellant on this appeal is that the appeal is taken because the trial court denied defendant's motion for new trial made upon the ground, among other things, that the damages assessed by the jury are grossly excessive, that the verdict is the result of passion and prejudice, is perverse, and because the answers to questions 3 and 4 of the special verdict are inconsistent.

For the appellant there was a brief by *Van Dyke, Shaw, Muskat & Van Dyke,* and oral argument by *Carl Muskat.*

For the respondent there was a brief by *Houghton, Neelen & Houghton,* and oral argument by *F. W. Houghton.*

KERWIN, J. There is evidence tending to show that plaintiff, a school teacher, forty years of age, lived at Beaver Dam, and during the summer of 1914 was taking a post-graduate course in Milwaukee normal school; that on July 14, 1914, she took a street car going home from the Normal and just before reaching Martin street rang the bell for the car to stop; that she had three or four books in her right hand; that she started toward the rear of the car, the conductor opened the door, and she took hold of the handle with her left hand and was in the act of alighting from the car when the conductor signaled for the car to go ahead and the car started; that the car started suddenly with a jerk as plaintiff was attempting to alight therefrom and she was thrown and came down with great force on her left side, her head striking the ground. The injury occurred July 14, 1914, and the trial was had September 16, 1915. There is an abundance of evidence that plaintiff was seriously injured and that she was still suffering from the injury at the time of the trial; that

she was suffering from traumatic neurasthenia, an injury to the nervous system.

1. The contention that questions 3 and 4 of the special verdict are inconsistent is not tenable. There is ample evidence to sustain the finding that the motorman was negligent in suddenly starting the car and that the conductor was negligent in giving the signal to the motorman to start the car before the plaintiff had alighted therefrom.

2. It is claimed that the damages awarded by the jury are excessive and the result of passion and prejudice on the part of the jury. It is true the damages are quite high, but it is also true that upon the evidence produced on the trial the injuries which the plaintiff sustained were quite serious, and we find nothing in the record which would warrant us in saying that the jury was actuated by passion or prejudice. The learned trial court below refused to disturb the verdict on the question of damages and we are not able to say that the court was clearly wrong.

By the Court.—Judgment is affirmed.

EISLER, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

March 16—April 11, 1916.

Railroads: Track elevation: Changing grade of street pursuant to city ordinance: Compensation.

1. The lowering of the grade of a street in front of a lot so as to make the street pass under railway tracks is not *damnum absque injuria*, but is a taking of property for railway purposes for which compensation must be made to the lotowner, even though his lot does not touch the railroad right of way, and even though the work is done by the railway company pursuant to a city ordinance enacted under the police power.
2. The taking in such a case, though done long after the railway was built, is none the less a taking by the railway company under its charter powers. The city cannot, in the absence of express legislative authority, confer upon the company any power to take.

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Proceedings for condemnation under sec. 1852, Stats. 1915, brought by the owner to determine the damages he has sustained by reason of the taking of his land by the railway company in raising its tracks across Kinnickinnic avenue in Milwaukee. When the railway was built the avenue existed and the road crossed it at grade and nearly at right angles. In 1906 the railway company was compelled by the city of Milwaukee to elevate its tracks above the avenue and to lower the latter so that it became a subway under the track. In making the subway it became necessary to lower the established grade of the avenue, and the grade was lowered in front of plaintiff's land which abutted on the avenue but did not touch the railroad right of way.

The circuit court entered an order appointing commissioners to determine the damages sustained by the petitioner by reason of the taking of his land. From such an order the railway company appealed.

C. H. Van Alstine and *H. J. Killilea,* for the appellant.

For the respondent there was a brief by *Otjen & Otjen,* and oral argument by *H. H. Otjen.*

VINJE, J. The railway company makes two main contentions on its appeal. The first is that since the change in grade was made in pursuance of the valid exercise of a police power the taking is *damnum absque injuria.* This contention was negatived by this court in *Buchner v. C., M. & N. W. R. Co.* 56 Wis. 403, 416, 14 N. W. 273, where it was held that the lowering of a grade of a highway in front of the owner of the premises to make it conform to the grade of the railway was not *damnum absque injuria,* but a taking of private property for which just compensation must be made as required in sec. 13, art. I, of the state constitution. This ruling was again reaffirmed in *Buchner v. C., M. & N. W. R. Co.* 60 Wis. 264, 273, 19 N. W. 56, and has since been stead-

fastly adhered to, the case of *Pabst B. Co. v. Milwaukee,* 157 Wis. 158, 147 N. W. 46, being the last to reaffirm it. It was there held that the right of taking on the part of the railroad is a continuing one that may be exercised at any time when occasion therefor occurs, and that each taking is the exercise of a power granted to it by the state.

The railroad company's second contention is that the taking in the present case is not a taking by the railway company, but is a taking by the city under an ordinance received in evidence passed by the city which in detail describes just how the track shall be elevated and the avenue lowered; prescribes the material to be used; provides that the city shall adjust and pay all damages caused by the change in grade of any street, and that the ordinance shall not be in force till accepted in writing by the railway company. The provisions of the ordinance are not set out in further detail because it is deemed they have no legitimate bearing upon any question raised by the appeal. The taking in the present case, though made a long time after the road was built, is none the less a taking by the railway company under its charter powers. In *Pabst B. Co. v. Milwaukee, supra,* it was expressly held that there was no power in the city to take land for railroad purposes. That being so, the city cannot, in the absence of express legislative authority so to do, confer any power upon the railway to take. It follows that, since the railway takes by virtue of its statutory power and the taking is not *damnum absque injuria,* the court properly appointed commissioners to determine the damages which the petitioner sustained by reason of the taking.

By the Court.—Order affirmed.

HRUBES, Administrator, Respondent, vs. FABER, Appellant.

March 16—April 11, 1916.

Physicians and surgeons: Malpractice: Degree of care and skill required: Death of child from diphtheria: Examination and treatment: Antitoxin: Proximate cause: Questions for jury.

1. A physician is not required to exercise the highest degree of skill or the utmost care in diagnosis or treatment, but only such reasonable care and skill as is usually exercised by physicians in good standing, of the same school, in the locality in which he is practicing.
2. Thus, a physician could not be held liable for the death of a child from diphtheria, on the ground of negligence or lack of skill in his diagnosis or treatment of the case, merely because he did not have a bacteriological or microscopical examination of the contents of the throat made, where the evidence showed that it was not usual or customary for physicians to have such an examination made except in cases where a membrane was present and did not show that in this case there was at any time a membrane, and no physician who testified was able to say, upon the evidence as to the symptoms, that defendant should have suspected the presence of diphtheria.
3. It being established by the evidence in such case, among other things, that, in the absence of a membrane or other symptoms pointing directly to the presence of diphtheria, antitoxin should not be administered; that such symptoms were not present; that the result where antitoxin is not administered in the early stages of diphtheria is uncertain, and that no one can say in a given case what the result would be if antitoxin were administered, a finding by the jury that the death of the child was caused by defendant's failure to exercise ordinary care was based upon mere conjecture and cannot stand.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

This is an action to recover damages for death alleged to have been caused by the unskilful and improper treatment by the defendant of Helen Hrubes, deceased daughter of the plaintiff, who died of diphtheria. The facts were these: The defendant, a practicing physician and surgeon, was

called to attend the deceased child on Saturday, October 12th. She first complained of sickness on Friday afternoon, October 11th. The only definite symptom was headache. She was in school on Friday morning but at home in the afternoon. She did not complain of anything else and did not complain of sore throat at any time. The defendant saw Helen at her home on the afternoon of October 12th, about twenty-four hours after she began to complain. At the time of such examination she complained of headache, and defendant found a swelling in the back part of the throat. There was no redness, the color was like the rest of the throat, only thickened; her general appearance was favorable and she had no fever. Helen, who was a little over seven years old, would not hold still, and the defendant advised her father to bring her to his office the next morning, Sunday, October 13th, in order that a more thorough examination might be made. At that time the defendant, assisted by Dr. Stolz, administered enough chloroform to relax the patient, and the defendant made a careful examination of the swelling and the throat and found no membrane present and discovered no other symptoms which caused him to suspect the presence of diphtheria. Dr. Stolz, who administered the anesthetic, examined the throat, and outside of a small circumscribed area on the left side, which he thought looked like an abscess and which might contain pus or fluid, there was no swelling or any sign of membrane, and no signs or symptoms of any serious condition outside of what appeared to be an abscess. The condition of the throat did not, in the opinion of Dr. Stolz, resemble diphtheria at all. The patient returned to her home and the defendant did not see her again until Tuesday evening, October 15th, when he was requested by the father to visit her again, which he did at her home. At that time she walked into the room where he was sitting and he made a slight examination. She had the same swelling, slightly en-

larged; there were no local signs to indicate the presence of diphtheria. On Tuesday evening the swelling was more pronounced, and particularly on the outside. At that time defendant prescribed the use of an ointment which is commonly used in treating mumps, and gave no other treatment. He did not see the child again, and she died without further treatment or examination the next day, Wednesday, at 11 a. m. At the time of her death she was unconscious, in great pain, and was bleeding from her mouth and nose and catching for breath. After consultation with the health authorities of the city of Milwaukee, *Dr. Faber* signed a death certificate stating the cause of death to be diphtheria. The evidence does not show how this conclusion was arrived at, whether by post-mortem examination or otherwise, and it was conceded upon the trial that the child died of diphtheria. Three physicians besides the defendant testified as to the symptoms, diagnosis, and treatment of diphtheria, and the case was submitted to the jury upon a special verdict.

The jury found (1) that the defendant failed to exercise ordinary care in diagnosing or treating the deceased, Helen Hrubes; (2) that such failure on the part of the defendant to exercise ordinary care caused the death of Helen Hrubes; (3) that the defendant did not advise the plaintiff on Sunday, October 13th, to get a physician other than himself to treat the child; (4) that defendant did not make known to the plaintiff that he did not want to take cases requiring visits or treatment outside of his office; (5) that the damages resulting from the death were $800. The plaintiff had judgment, which was affirmed by the circuit court for Milwaukee county on appeal, and from the judgment of the circuit court this appeal is brought.

For the appellant there were briefs by *Lines, Spooner, Ellis & Quarles,* and oral argument by *Leo Mann.*

F. F. Groelle, for the respondent.

ROSENBERRY, J. The defendant moved for judgment notwithstanding the verdict, and assigns as error the refusal of the trial court to grant such motion and bases his argument in support thereof upon two propositions:

(1) There is no evidence of any want of ordinary care and skill on the part of the defendant in the diagnosis and treatment of the deceased child.

(2) There is no proof that the failure to administer antitoxin, concededly the proper treatment, was the cause of the child's death.

There was no substantial variation in the testimony of the physicians as to the symptoms of diphtheria and that the treatment thereof when its presence is established requires the administration of antitoxin. Summarizing the testimony of the physicians, the following appear to be the usual and ordinary symptoms of diphtheria: It may develop four or five days before death; it sometimes develops within twelve hours of death, and death sometimes occurs at a considerable interval of time after the patient has apparently recovered. It usually commences with a sore throat, general lassitude or tired feeling, rise of temperature, although fever is sometimes absent, and a swelling of the involved parts, although in some cases the swelling is very slight. It is ordinarily located in the mucous membrane of the throat, sometimes in the nose, sometimes in the larynx, and sometimes all three places are involved. A white membrane is usually formed over the involved area within twenty-four to forty-eight hours, depending on the activity of the disease. In making a diagnosis of a suspected case of tonsillar diphtheria, the physician would make an ordinary examination under the eye by looking into the throat and observing its condition, and if there was a membrane he would then make or cause to be made a bacteriological or miscroscopical examination of the contents of the throat. The membrane is the danger signal, the characteristic symptom, but is sometimes present in other diseases, not-

ably follicular tonsillitis, and in order to determine whether or not a patient is suffering from diphtheria a bacteriological or microscopical examination should be made, which will determine the character of the disease. In some cases a physician having and exercising the highest degree of skill might still err in his diagnosis. As soon as the diagnosis of diphtheria is made, the use of antitoxin should be resorted to, it being injected under the skin, and the involved area is treated locally by the use of antiseptics.

It appears from the evidence that if antitoxin is administered promptly, that is, within twelve to twenty-four hours from the time the patient comes down with the disease, ninety-six to ninety-seven cases out of one hundred recover; that if it is administered later during the progress of the disease the results are uncertain; that in cases of diphtheria where antitoxin is not administered, from fifty to sixty out of one hundred recover. No physician can say with a reasonable degree of certainty that the use of antitoxin will produce recovery in any given case; it might work out in one case and not work out in another. So that it cannot be said in any given case that a recovery would have been certain had antitoxin been used.

The physicians agreed that it was not usual and customary practice to have a bacteriological or microscopical examination made except in cases where a membrane developed, and no physician was able to say, upon the testimony in this case as to the symptoms of the deceased child, that the defendant should have suspected the presence of diphtheria, there being no complaint as to sore throat, although she had a sore throat, no complaint as to backache, tiredness, and no membrane present, and no temperature.

The case was submitted to the jury apparently upon the theory that, it being an admitted fact that the child died of diphtheria and it being established that a bacteriological or microscopical examination of the contents of the throat will

determine the presence or absence of the disease in a given case, and it appearing that the defendant had not caused such examination to be made, the jury might say whether or not he had exercised ordinary care in his endeavor to discover the child's ailment. This wholly ignores the standard of care and skill which the defendant was obliged to exercise. The law upon this question is plain and elementary and has been many times declared by this court:

"The general rule of law is that a physician or surgeon, or one who holds himself out as such, whether duly licensed or not, when he accepts an employment to treat a patient professionally, must exercise such reasonable care and skill in that behalf as is usually possessed and exercised by physicians or surgeons in good standing, of the same system or school of practice, in the vicinity or locality of his practice, having due regard to the advanced state of medical or surgical science at the time. This rule is elementary. It has its foundation in most persuasive considerations of public policy. Its purpose is to protect the health and lives of the public, particularly of the weak or credulous, the ignorant or unwary, from the unskilfulness or negligence of medical practitioners, by holding such practitioners liable to respond in damages for the results of their unskilfulness or negligence." *Nelson v. Harrington,* 72 Wis. 591, 597, 40 N. W. 228; affirmed, *Wurdemann v. Barnes,* 92 Wis. 206, 66 N. W. 111; *Marchand v. Bellin,* 158 Wis. 184, 147 N. W. 1033.

It appeared without dispute that it is not usual or customary for physicians to cause bacteriological or miscroscopical examinations of the contents of the throat to be made except in cases where a membrane is present. There is not a particle of evidence to show that there was at any time any membrane present in the throat of the deceased child, and, it appearing without dispute that some cases baffle the most skilful diagnosticians, the case at bar may have been such a case, in which event the defendant cannot be held liable for his failure to make a correct diagnosis and consequent failure to properly treat the patient. The law does not require impos-

sibilities, or even the exercise of the very highest degree of skill or the utmost care, but only such reasonable care and skill as is usually possessed by physicians of the same school in the locality. The presence of the membrane not being established, there is no evidence in this case upon which the jury could base a verdict finding that defendant did not exercise ordinary care.

The jury found that the failure of the defendant to exercise ordinary care was the proximate cause of the death of the child. We have carefully examined all the evidence in the case, and there is no evidence which shows or tends to show that the exercise of ordinary care and skill by the defendant in this case would have prevented the child's death. The medical testimony shows conclusively that the result where antitoxin is not administered in the early stages of diphtheria is uncertain, and that no one can say in a given case what the result would be if antitoxin were administered. It appears without dispute that the defendant made a careful and thorough examination of the child more than twenty-four hours after her illness began, in which he was assisted by another physician, and that in order to make the examination thorough and complete the child was given an anesthetic and the cavity of the throat thoroughly explored and that at that time there was no membrane present, and according to the evidence a microscopic or bacteriological examination was not indicated. It is further undisputed that the defendant examined the child on Tuesday evening, the night before her death, and at that time there was no membrane present in the throat. The physicians further agreed that, in the absence of a membrane or other symptoms pointing directly to the presence of the disease, antitoxin should not be administered. The other symptoms were not present in this case. The verdict of the jury to the effect that the failure of the defendant to exercise ordinary care and skill resulted in the death of the child is a mere conjecture and has no founda-

tion, substantial or otherwise, in the evidence. "Verdicts cannot rest in mere conjecture." *Samulski v. Menasha P. Co.* 147 Wis. 285, 133 N. W. 142. It follows that the motion for judgment notwithstanding the verdict should have been granted by the civil court.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to the circuit court to enter judgment for the defendant dismissing the plaintiff's complaint on the merits.

GREEN, Respondent, vs. SOMERS, Appellant.

March 16—April 11, 1916.

Master and servant: Wrongful discharge: Remedy of servant: Grounds for discharge: Insubordination: Questions for jury: Appeal: Direction of final judgment.

1. Where an employee is wrongfully discharged, having been paid in full up to that time, his remedy is by action for damages for breach of the contract of employment and not by action for wages under the contract.
2. An employer has the right to give all lawful and reasonable commands deemed by him necessary to the proper management of his business, and the employee's duty is to obey such commands where there is nothing in the contract of employment to relieve him from such duty.
3. Any inexcusable and substantial insubordination on the part of an employee, or wilful refusal to obey such commands amounting to insubordination, is good ground for discharge; but whether a mere breach of duty—it being in dispute whether wrong was intended or injury inflicted—is good ground for discharge, is a question for the jury.
4. Where the facts are undisputed and it is certain that the disobedience is wilful and contumacious, it may be the duty of the court to determine as matter of law that the commands given were lawful and reasonable and the refusal to obey inexcusable; and if such be the case there is no question for the jury.
5. Commands, given by his employer to the general manager of a hotel, to appoint an assistant manager, to have the storekeeper

make all purchases, to close the hotel laundry, and to discharge the help privately employed, are *held* as matter of law to have been lawful and reasonable commands which the manager wilfully and inexcusably refused to obey; and the discharge of the manager because of such refusal was lawful.

6. In an action based on alleged wrongful discharge of an employee, the issue having been fully litigated and the testimony being all before this court, which holds that on the admitted facts the discharge was lawful, no new trial is necessary or proper, and final judgment for the defendant is ordered.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Reversed.*

Action to recover one month's salary and living expenses claimed to be due the plaintiff under a written contract. The contract was made October 1, 1913, and by its terms the defendant employed the plaintiff as "general manager of the Plankinton House" in Milwaukee for the period of two years from that date at a salary of $7,500 per annum, payable in equal monthly instalments at the end of each month; the plaintiff being allowed to retain and occupy certain quarters in the hotel, then occupied by himself and family, so long as the hotel should remain open, and in case of the demolition of the hotel the plaintiff to be allowed and paid at the end of each month the necessary living expenses of himself and family, not exceeding $300 per month, until other suitable quarters should be furnished him. The duties of the plaintiff as manager were not defined by the contract any further than they may be said to be defined by the use of the words "general manager." The plaintiff was discharged and ceased to act as manager July 1, 1914, and this action is to recover his salary and living expenses for the month of July, 1914. The defendant justified the discharge by reason of plaintiff's wilful refusal to carry out the defendant's orders and instructions as to the management of the house.

The facts were not seriously in dispute. At some time prior to the making of the agreement in suit the defendant obtained a ninety-nine-year lease of the hotel property from

the owners, the trustees of the estate of John Plankinton, and took possession thereof under such lease. The plaintiff was at that time the manager of the hotel under the trustees and so continued until the execution of the contract hereinbefore set forth, after which he remained as manager under the contract aforesaid. Mr. George Harvey was the defendant's personal representative in complete charge and control of his interests in Milwaukee (which included other real property besides the hotel) and remained such representative until about May 1, 1914, when he was succeeded by his brother, H. B. Harvey. The hotel had then been running at a loss of from $5,000 to $8,000 a month for some months and the defendant wished to curtail expenses and stop the loss if possible. The fact that the hotel was expected to be torn down in the near future to make way for a new building had a bad effect on the patronage of the house. H. B. Harvey had various conferences with the plaintiff during the month of May with regard to the management of the hotel and as to certain proposed retrenchments. They could not agree as to many things. On May 28th Harvey commenced issuing to the plaintiff written orders, the first one being an order to operate the hotel on both American and European plans. This was carried out by *Green* and other orders followed. *Mr. Green* objected that he had no evidence of Mr. Harvey's authority to represent the owners. Proof of Harvey's authority to represent the defendant being furnished, the disagreements still continued through the month of May. Out of some thirty or forty orders issued by Harvey the plaintiff absolutely refused to obey the following: (1) An order to appoint an assistant manager and issue all orders through him; (2) an order that he (plaintiff) should, when he was about to be absent from the hotel, leave a notification of the same on the books of the hotel naming the hours of leaving and returning; (3) an order directing the discharge of certain help retained by the plaintiff and his family and paid from the

hotel funds; (4) an order directing that all purchases be made by the steward, who was at that time purchasing the foodstuffs but not the wines, liquors, and replacements; (5) an order directing that the hotel laundry be closed; (6) an order directing that one Blennerhasset, plaintiff's uncle by marriage, who was living at the hotel, register as a guest and pay his board; and (7) an order that the upholsterer employed by the hotel be discharged. The plaintiff having finally refused to obey any of these last named orders on June 30th, he was discharged on the following day.

A motion to direct a verdict for the defendant was overruled, and, the plaintiff being required to elect whether the action was on the contract for a specific month's salary or for breach of the contract, elected that the action was on the contract for the month's salary. Thereupon the cause was submitted to a jury, which returned a general verdict for the plaintiff for $625. Judgment being entered for the plaintiff on this verdict the defendant appeals.

For the appellant there was a brief by *Quarles, Spence & Quarles,* attorneys, and *I. A. Fish,* of counsel, and oral argument by *Mr. Fish.*

Paul D. Durant, for the respondent.

WINSLOW, C. J. In this case it is held:

1. Where an employee is wrongfully discharged, having been paid in full up to that time, his remedy is by action for damages for breach of the contract of employment and not by action for wages under the contract. *Kennedy v. South Shore L. Co.* 102 Wis. 284, 78 N. W. 567; *Ornstein v. Yahr & Lange D. Co.* 119 Wis. 429, 96 N. W. 826.

2. An employer has the right to give all lawful and reasonable commands deemed by him necessary to the proper management of his business, and the employee's duty is to obey such commands where there is nothing in the contract of employment to relieve him from such duty.

3. Any inexcusable and substantial insubordination on the part of an employee or wilful refusal to obey such commands amounting to insubordination, is good ground for discharge. *Thomas v. Beaver Dam M. Co.* 157 Wis. 427, 147 N. W. 364; 26 Cyc. 992. Such a case is to be distinguished from a case where there has been a mere breach of duty, it being in dispute whether wrong was intended or injury inflicted, in which latter case it is a question for the jury whether such breach is good ground for discharge. *Schumaker v. Heinemann,* 99 Wis. 251, 74 N. W. 785.

4. Where the facts are undisputed as in the present case and it is certain that the disobedience is wilful and contumacious, it may be the duty of the court to determine as matter of law that the commands given were lawful and reasonable and the refusal to obey inexcusable, and if such be the case there is no question for the jury. *Thomas v. Beaver Dam M. Co., supra; Jerome v. Queen City C. Co.* 163 N. Y. 351, 57 N. E. 485.

5. In the present case it is held as matter of law that there were several lawful and reasonable commands given by the employer which the employee wilfully and inexcusably refused to obey, and among these were the commands (1) to appoint an assistant manager, (2) to have the storekeeper make all purchases, (3) to close the hotel laundry, (4) to discharge the help privately employed, and perhaps others.

6. Under the admitted facts the discharge was lawful, and a verdict for the defendant should have been directed whether the action be regarded as an action for wages on the contract or an action for damages for breach of the contract.

7. The testimony on the subject being all before the court and the issue as to the lawfulness of the discharge having been fully litigated, no new trial is necessary or proper. Final judgment should now be ordered.

By the Court.—Judgment reversed, and action remanded with directions to render judgment for the defendant notwithstanding the verdict.

STATE EX REL. PABST BREWING COMPANY, Respondent, vs. KOTECKI, City Comptroller, Appellant.

March 16—April 11, 1916.

Taxation: Double assessment due to clerical error: Payment, when not voluntary: Recovery of illegal tax.

1. **Where, after a taxpayer had examined the assessment roll and found it to be correct as to certain items of his property, the assessor re-entered those items under other heads and by a purely clerical error omitted to strike out the original entries, thus making a double assessment of such items, the taxpayer was not chargeable with constructive notice of such mistake so as to make his payment of the excessive tax a voluntary payment; and he had a legal right to have the excess refunded, which might be enforced under sec. 1164, Stats.**
2. **Taxpayers may assume the correctness of the entries and the computation made in extending their taxes on the roll, and of the statements made to them at the time of payment, and are not bound before making payment to search the books to ascertain the facts.**

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

This is an appeal from an order overruling the defendant's motion to quash an alternative writ of *mandamus* directing the city comptroller to countersign the city's order in plaintiff's favor for $8,739.32 as required by a resolution of the common council of the city.

The relation states the following facts: In June, 1913, the plaintiff furnished to the proper assessor a statement of its taxable property in the Second ward of the city. This statement contained an item of $300,000 for machinery, brewing vats, and tanks, excepting some machinery and boilers, and an item of $182,516 for bottles, boxes, corks, and caps. The assessor inserted these two items on the assessment roll as personal property. The plaintiff, prior to the meeting of the board of review, examined the assessment roll and found these items thereon. On the day before the adjournment of the

board of review the assessor determined that these two items were not entered on the roll in proper form and decided that the item of $300,000 should be assessed as real estate and entered the items on the roll as a real-estate assessment, and that the item of $182,516 should be included in a category of personal property assessment other than the one in which it had been entered, and assessed and transferred the item to another category of personal property. But the assessor omitted to strike the two items from the roll where they had been originally entered, which resulted in having each item entered on the roll twice and in having each item twice included in the assessment and levy of the tax. The plaintiff had no notice of this clerical mistake in making up the assessment roll and paid the tax on the double assessments included in its tax bill.

In August, 1914, the error was discovered, and the plaintiff, under ch. 478, Laws 1913, immediately petitioned the common council upon these facts for a refund of $8,739.32, the excess amount it was required to pay on account of the double assessments. This petition was referred to committees as required by the procedure of the common council and was properly reported to the common council and was, on December 21, 1914, adopted by the common council, allowing the claim as a just and proper refund for unlawful taxes and directing that this amount be included by the board of estimates in the budget for 1915. The resolution was approved by the mayor on December 28, 1914.

On March 29, 1915, a resolution was presented to the common council reciting the previous steps taken in the matter and providing that the proper city officers draw an order of the city for $8,739.32, payable to the plaintiff, as a refund of such unlawful tax and that the amount be charged to the proper city fund. This resolution was duly referred, properly audited as a claim by the defendant as comptroller, and reported to and passed by the common council and approved

by the mayor on May 28, 1915. The city clerk drew the order as directed by the resolution and presented it with the resolution to the defendant *Kotecki,* as comptroller, who refuses to audit the resolution and countersign the city order for the refund. The petition alleges that at the time the last resolution was adopted and approved the city had funds in its possession, not otherwise appropriated, for the payment of this refund to the plaintiff.

For the appellant there was a brief by *Daniel W. Hoan,* city attorney, and *Clifton Williams,* first assistant city attorney, and oral argument by *Mr. Williams.*

For the respondent there was a brief by *Quarles, Spence & Quarles,* attorneys, and *I. A. Fish,* of counsel, and oral argument by *Mr. Fish.*

SIEBECKER, J. Sec. 1164, Stats., makes provision for the filing of a claim against a city by a taxpayer who is aggrieved by the levy and collection of any unlawful tax assessed against him. It also authorizes the common council, if the tax for which claim is made is unlawful and the conditions prescribed by law for the recovery of illegal taxes have been complied with, to allow such claim, and provides that the treasurer shall pay the amount of the claim allowed as excessive and illegal. The allegations of fact in the relation show that the common council took the usual and required steps for allowance of claims and that the city has the necessary funds on hand to pay it. It is clear that the common council acquired jurisdiction of the matter. It is contended that the defendant is justified in his refusal to audit the claim and to countersign the city order upon the ground that the plaintiff voluntarily paid this tax. It is urged that the plaintiff at the time of payment had either actual or constructive notice of the mistake of the city officers in making up the assessment roll and in levying and collecting the tax. The facts alleged show that the plaintiff had no actual notice

of the mistake, nor do the facts alleged permit of charging plaintiff with constructive notice of the mistake. It is obvious that the excessive tax was the result of a purely clerical error of the assessor, who had no intention to insert these two items twice each on the assessment roll. The plaintiff relied on the roll as found upon examination before the assessor attempted to change it and had a right to presume that it was not changed thereafter. The claim that plaintiff must act at its risk in assuming the correctness of the computation made by the taxing officers in extending the amounts of its tax on the tax roll is not well founded. It would be a most unjust imposition on taxpayers to require of them to search the books to ascertain the correctness of the entries and the computation made in extending the tax on the roll and in making statements to taxpayers at the time of payment. *Harrison v. Milwaukee,* 49 Wis. 247, 5 N. W. 326; *Gould v. Sullivan,* 84 Wis. 659, 54 N. W. 1013; *Gould v. Killen,* 152 Wis. 197, 139 N. W. 758; *Dolman v. Pitt,* 109 Mo. App. 133, 82 S. W. 1111. It is clear that plaintiff paid this unlawful tax bill without any notice of the mistake. The facts alleged show clearly that the payment of this amount was the result of a mistake of fact due to an error committed by the city officers, and plaintiff's payment thereof as a lawful tax constitutes, under the circumstances, a fraud, which entitles plaintiff to recover. The language of the court in the case of *Pacific Coast Co. v. Wells,* 134 Cal. 471, 66 Pac. 657, characterizes the transaction in apt terms: "It was an assessment made by the assessor in changing the footings of petitioner's assessment. It was paid without consideration, and the city and county have no right to it. Petitioner has paid all its just taxes, and this sum in addition. . . . The board of supervisors [here the common council], representing the county [here the city], after investigation, made an order to correct it. . . . It surely would be in violation of honesty and fair dealing" for the city to keep it. The plaintiff has a legal right to have

this amount refunded, which is made enforceable by action under the provisions of sec. 1164, Stats.

It is considered there is no merit to the following claims that the court erred in refusing to quash the writ on these grounds: (a) that the report of the committee was not properly signed or countersigned by the comptroller; (b) that there were no funds on hand out of which to pay the order—the facts allege to the contrary; (c) that plaintiff was guilty of laches—the allegations show plaintiff acted diligently; and (d) that the comptroller is presumptively acting under the advice of the city attorney.

The statute provides that "Every such claim shall be filed; and every action to recover any money so paid shall be brought within one year after such payment and not thereafter." The allegations of fact in the relation show plainly that the plaintiff proceeded properly within the year and fulfilled the calls of the statute.

By the Court.—The order appealed from is affirmed.

LESHIN and another, Respondents, vs. ROUTT, Appellant.

March 16—April 11, 1916.

Fraudulent representations: Findings: Evidence: Landlord and tenant: Covenant against subletting: Waiver by lessor: Lease construed.

1. In an action to recover damages caused by fraudulent representations, a finding by the trial court that defendant, the lessee of a store building under a lease providing that he should not sublet the premises without written consent of the lessor, fraudulently stated to plaintiffs that he had the legal right and authority to lease the premises to them and had obtained the written consent of the owner so to do, is *held* to be sustained by the evidence.
2. Where, after defendant had leased said building to plaintiffs for the remainder of his own term, the lessor at all times received the rent from defendant and, after learning that plaintiffs were

not connected in business with defendant but claimed to be his lessees, notified them that the lease to them was without her consent and that they occupied the premises at her will, there was no waiver of her right to re-enter which would entitle plaintiffs to remain in possession as her tenants under the lease to defendant.

3. Provisions in the lease from defendant to plaintiffs making it subject to all the terms and conditions of the lease to defendant, and that it should be canceled and of no effect whenever defendant's rights as tenant of the owner should cease for any cause, meant that plaintiffs took the lease on the terms contained in the lease to defendant, with the clause against subletting eliminated by written consent of the owner.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Action to recover damages based upon fraudulent representations. The action was commenced and tried in the civil court of Milwaukee county, and the court found the facts in favor of the plaintiffs. Upon appeal to the circuit court the case was tried and the following findings of fact and conclusions of law made:

The plaintiffs were copartners, as alleged in the complaint; that on and prior to the 27th day of September, 1911, the defendant was in possession of the lower floor and basement of the building known and described as No. 331 Third street, in the city and county of Milwaukee, Wisconsin; that said defendant was in possession of said premises under and by virtue of a lease executed by the owner of said premises, one Jennie Blinkenstine, to the said defendant for a term of years beginning June 1, 1911, and ending May 15, 1914; that said lease between defendant and said Jennie Blinkenstine contained the following clause: "And the said lessee does covenant and agree not to assign or underlet the said premises, or any part thereof, or otherwise part with this indenture or the premises hereby leased, or any part thereof, to any person or persons whatever, without the consent thereto in writing of said lessor, her representatives or assigns, first

had and obtained in writing thereto;" that on the 25th day of September, 1911, the defendant, *Max Routt,* falsely and fraudulently stated to the plaintiffs that he had the legal right and authority to lease the premises hereinbefore described to the plaintiffs herein, and that he had obtained the consent in writing of the owner of said premises, Jennie Blinkenstine, so to do; that the plaintiffs herein relied upon the false and fraudulent statement of the defendant that he had obtained the consent to lease said premises to the plaintiffs and that he had the right so to do, and entered into a lease of said premises from the 27th day of September, 1911, to the 15th day of May, 1914; that after the plaintiffs herein had entered into possession of said premises under their lease with the defendant, the owner of the building, Jennie Blinkenstine, notified these plaintiffs that the lease given to them by the defendant was without the consent of the owner of said premises, Jennie Blinkenstine, and that these plaintiffs occupied said premises at the will of said Jennie Blinkenstine; that because of the uncertainty of their tenure to said premises the plaintiffs herein were not justified in buying a stock of goods adequate for the size of said premises so leased; that because of the uncertainty of the tenure under which they occupied said premises and because they could not legally obtain a lease of said premises for a definite period, the plaintiffs herein suffered loss in the conduct of their business while they occupied the same; that it was necessary for the plaintiffs to occupy the premises for the length of time they did to reduce the loss sustained by them to a minimum; that because of the false and fraudulent representations made by the defendant to induce the plaintiffs to make the lease hereinbefore referred to, the plaintiffs suffered loss during their occupation of said premises up to the commencement of this action in the sum of $1,000; that all the material allegations in plaintiffs' complaint as to fraud and deceit on the part of the defendant are proven and true.

The court concluded that the plaintiffs were entitled to

judgment against the defendant for the sum of $1,000, with interest from the commencement of this action, to wit, March 21, 1912, together with the costs of this action to be taxed. Judgment was entered accordingly, from which this appeal was taken.

For the appellant there was a brief by *Churchill, Bennett & Churchill,* and oral argument by *W. H. Churchill.*

Henry J. Killilea, for the respondent.

KERWIN, J. Counsel for appellant contends that upon the undisputed facts the judgment below should be reversed. This contention, as we understand counsel, is based upon the claim that the lessor, Jennie Blinkenstine, on breach of the condition of the lease by the lessee, *Routt,* had the right to re-enter, and that failure to do so and acceptance of rent operated as a waiver of the forfeiture and entitled the plaintiffs here to remain in possession as tenants of Jennie Blinkenstine under the lease between said Jennie Blinkenstine and defendant, *Routt.* The trouble with this contention is that it is not based upon undisputed evidence. Jennie Blinkenstine at all times received the rent from her lessee, *Routt,* and claims that at first, after possession was taken by the plaintiffs, she did not understand that they were lessees of *Routt,* but thought that they were in some way connected in business with *Routt;* and the evidence further tends to show that after Jennie Blinkenstine learned that plaintiffs claimed to be lessees of *Routt* she notified them that the lease to them by defendant, *Routt,* was without her consent and that they occupied said premises at the will of said Jennie Blinkenstine.

It is true, as contended by counsel for appellant, that the lease from defendant to plaintiffs contained the following provisions:

"This lease is subject to all terms and conditions of a certain lease between the lessor herein and one Jennie Blinkenstine wherein said Jennie Blinkenstine is lessor and said *Max Routt* is lessee.

"It is expressly agreed and understood by and between the parties hereto that this lease shall be canceled and of no effect whenever the rights of *Max Routt* as tenant of said Jennie Blinkenstine cease for any cause."

These provisions obviously mean that the plaintiffs took the lease from the defendant on the same terms contained in the lease from Jennie Blinkenstine to defendant, *Routt,* with the clause against subletting eliminated or modified by consent in writing to sublet the premises to the plaintiffs. The court below found upon sufficient evidence that the defendant falsely and fraudulently stated to the plaintiffs that he had the legal right and authority to lease the premises to them and that he had obtained the consent in writing of Jennie Blinkenstine, the owner of said premises, so to do.

It is further insisted that the evidence does not support the findings. A careful examination of the record convinces us that there is ample evidence to support the findings, therefore the judgment is right and must be affirmed.

By the Court.—The judgment is affirmed.

SAUDEK, Respondent, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant.

March 16—April 11, 1916.

Workmen's compensation: Death of city employee: Cause of action against third person: Assignment to city: Reassignment to widow: Validity: Consideration: Retention by city of control over litigation.

1. After a cause of action in tort in favor of the widow of a city employee and against a wrongdoer whose negligence is alleged to have caused such employee's death had, pursuant to sec. 2394—25, Stats., become the property of the city, it reassigned the same to her by an instrument wherein she covenanted that she would prosecute the action; that the assistant city attorney should be retained by her and permitted to act as her attorney and should

have full control over the litigation; and that if she should collect any damages therein she would pay to the city, after deducting reasonable charges and expenses incurred, the amount so collected not exceeding the amount which the city had paid to her under the Workmen's Compensation Act, with interest,—any excess to be retained by her. *Held*, that since the widow thereby became liable to a judgment for costs in case she did not recover anything in the action, the assignment to her was not without a valuable consideration moving to the city; nor can it be said that such consideration is so grossly inadequate that the assignment amounted to a gift of public property for private purposes.

2. Such cause of action being, like other property of the city, under the management and control of the council, could be sold by it to any one for an adequate consideration.
3. The fact that the assistant city attorney was to have control of the litigation and of the amount for which the case might be settled, did not render the assignment void as against public policy—the agreement not being one between attorney and client.
4. A person may assign a cause of action owned by him and by the terms of the assignment retain control of the litigation.

SIEBECKER and ROSENBERRY, JJ., dissent.

APPEAL from an order of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

Action to recover damages for the death of plaintiff's husband, who at the time of his death was in the employ of the city of Milwaukee as a lineman, and who met his death, it is alleged, through the negligence of the defendant. The deceased was under the Workmen's Compensation Act, and plaintiff received from the city the sum of $3,000, the amount due her under the act. Subsequently the city assigned to her its cause of action under an agreement as follows:

"In consideration of the covenants herein contained, the said city of Milwaukee does hereby assign, transfer, and set over unto the said *Ordella Saudek,* her heirs and assigns, forever, any and all claims of whatsoever kind or nature which the said city of Milwaukee has or may have against the *Milwaukee Electric Railway and Light Company,* or any other person or persons, on account of the death of said Walter Saudek,

or of the payment by said city of Milwaukee to *Ordella Saudek* of the sum of three thousand dollars ($3,000) on account of said death. That said *Ordella Saudek* hereby expressly covenants and agrees that in case she shall collect any damages from any third person arising out of the death of Walter Saudek and pursuant to this assignment, that she will, after deducting all reasonable charges and expenses necessarily incurred in the prosecution of such claim, pay the amount so collected to the city of Milwaukee, provided, however, that if such net amount shall exceed the sum of three thousand dollars ($3,000), together with interest thereon at the rate of six per cent. (6 %) from the date of payment of said sum of three thousand dollars ($3,000) to *Ordella Saudek* by the city of Milwaukee, then in such case such excess shall belong to and be retained by the said *Ordella Saudek,* and said *Ordella Saudek* further agrees that the city of Milwaukee shall have a lien on the claim hereby assigned and on any moneys that may become payable to her by reason of a judgment upon said claim or a settlement of the same to secure the payment to the city of the said sum of three thousand dollars ($3,000) and interest, and that the said sum shall be paid directly by and from the party who is adjudged liable, or who agrees to pay the same, to the said city of Milwaukee. Said *Ordella Saudek* further agrees that she will promptly commence action against the *Milwaukee Electric Railway and Light Company,* or any other persons liable under said claim, and that the assistant city attorney who is in charge of the compensation claims of the city shall be retained by her and permitted to act as her attorney, together with such other attorneys as she may retain in the prosecution and settlement of said claim, and that said assistant city attorney shall have authority to determine what amount shall be accepted in settlement of said claim, and shall have charge of and control over the prosecution of said action, and may determine whether appeal shall be taken from any judgment which may be rendered therein, and said *Ordella Saudek* further agrees that she will execute such releases or other instruments as may be required to consummate any agreement of settlement of said claim which may be made on her behalf by the said assistant city attorney."

These and other facts material to a cause of action against the defendant appearing in the complaint, the defendant demurred thereto on the ground that it appeared from the complaint that no valid assignment of the city's cause of action against the defendant was made to the plaintiff. The demurrer was overruled and the defendant appealed.

For the appellant there was a brief by *Van Dyke, Shaw, Muskat & Van Dyke,* and oral argument by *Ralph M. Hoyt.*

For the respondent there was a brief by *E. L. McIntyre* and *Yockey & Simon,* and oral argument by *Mr. McIntyre.*

VINJE, J. By virtue of the payment made by the city to the plaintiff of $3,000 in full for all claims by her against it under the Workmen's Compensation Act her cause of action against the defendant passed to the city and became its property to be dealt with by it the same as any other property of a like kind. *McGarvey v. Independent O. & G. Co.* 156 Wis. 580, 146 N. W. 895. The first claim of the defendant is that the reassignment of the cause of action to plaintiff is virtually a gift to her of public property for private purposes. Her deceased husband was only thirty-one years of age at the time of his death and had been earning $100 per month, hence it is urged the cause of action may be worth $10,000. For the city to sell it for a reimbursement of $3,000 and interest, if such or a greater sum over and above costs of suit is recovered, with free use of the city's legal department, is claimed to be tantamount to a donation of the cause of action to the plaintiff. We cannot concur in this view. No one can tell the value of the cause of action assigned. It may be worth much or nothing. It cost the city $3,000. Under the terms of the assignment the city is to be reimbursed that amount if a recovery of that amount and costs is had; if not, then a less amount depending upon the amount recovered, and nothing if no recovery is had. The assignee promises to prosecute the action and thereby becomes liable for a judgment of costs if she cannot recover anything. This in itself is a

valuable consideration moving to the city. In view of the other terms of the assignment we cannot say that it is so grossly inadequate as to amount to a gift of public property for private purposes.

The claim that the city has no charter powers to sell the cause of action is wholly untenable. Sec. 3, ch. IV, of the charter of 1905 says: "The common council shall have the management and control of the finances, and of all the property of the city, except as in this act otherwise provided." The property in question does not come under any exception, so it is left under the control of the common council. Being under its control, it could sell it to any one for an adequate consideration.

Lastly, it is argued that the assignment is void on the ground of public policy because the city attorney has control of the litigation and of the amount at which the case may be settled; that such an agreement between an attorney and client is void. Conceding that such agreements between attorneys and clients are void, still that fact does not reach this case. Here the agreement is between the city and the plaintiff. The city, the assignor, retains the right to determine the amount at which the case may be settled and intrusts the execution of that right to its agent, the city attorney. The contract is between the assignor and assignee, and is more analogous to contracts between insurance companies and employers of labor in which the control of the litigation and right to settle is placed in the hands of the insurance company. In such cases there may arise a conflict of interest, as pointed out in *Wis. Z. Co. v. Fidelity & D. Co.* 162 Wis. 39, 155 N. W. 1081, but the contracts have nevertheless been held valid. The city as to this branch of the case stands in the same relation to plaintiff that indemnity insurance companies stand to the insured. A person may assign a cause of action owned by him and by the terms of the assignment retain control of the litigation. *Rucker v. Bolles,* 80 Fed. 504.

By the Court.—Order affirmed.

SIEBECKER, J. (*dissenting*). I am unable to concur in the decision of the court sustaining the assignment of the city's cause of action to plaintiff. The terms of this assignment, in my opinion, do not effect a transfer of this claim, and the transaction leaves the question of a valuable consideration so doubtful as to affect its validity. The formal terms of the assignment are that the city, "In consideration of the covenants herein contained, . . . assign, transfer, and set over to *Ordella Saudek,* her heirs and assigns, forever," the claim of the city "against the *Milwaukee Electric Railway and Light Company* on account of the death of said Walter Saudek, or of the payment by said city of Milwaukee to *Ordella Saudek* of the sum of three thousand dollars ($3,000) on account of said death." It also states that if *Ordella Saudek* collects damages arising out of such claim ". . . *that she will, after deducting all reasonable charges and expenses necessarily incurred in the prosecution of such claim,*" pay to the city $3,000 with interest, and she is to receive the excess, if any; the city reserves a lien on the money collected by her, and that *Mrs. Saudek* will promptly commence an action to recover on the claim. It is also stipulated "that the assistant city attorney shall be retained by her and permitted to act as her attorney," with counsel she may retain "in the prosecution and settlement of said claim, and *that said assistant city attorney shall have authority to determine what amount shall be accepted in settlement of said claim, and shall have charge of and control over the prosecution of said action, and may determine whether appeal shall be taken from any judgment which may be rendered therein, and said Ordella Saudek further agrees that she will execute such releases or other instruments as may be required to consummate any agreement of settlement of said claim which may be made on her behalf by the said assistant city attorney.*" By these provisions the city in practical effect nullifies the preceding terms of transfer to plaintiff and confers on its assistant city attorney full and unqualified dominion over the claim

and its enforcement thereof against any party liable for the alleged damages resulting from Saudek's death, and delegates to him the authority to determine whether or not the plaintiff shall be entitled to any interest in the claim. He is authorized to settle for an amount less or equal to or above the amount the city paid plaintiff on account of her husband's death. The expense of collection is also to be paid out of any money collected thereon. In substance and effect these conditions are repugnant to the idea that the claim is sold, assigned, and transferred to the plaintiff, for she has no right to deal with the claim as owner, as such control is delegated by the city to the assistant city attorney and authorizes him to do therewith as he may deem fit, regardless of plaintiff or the city. *Bernhardt v. Rice,* 98 Wis. 578, 74 N. W. 370. The extent of his authority is such that it does not require him to report his action to the common council for approval. The whole transaction, so far as the plaintiff is concerned, seems to disclose a purpose to have the city prosecute the alleged cause of action in plaintiff's name, pay the costs out of whatever sum is recovered, reimburse the city to the amount of $3,000 it paid plaintiff under the Compensation Act, and, if anything is realized in excess of these items, such excess is to go to plaintiff as a gift.

I am unable to concur in the view that the written assignment by its terms operated to transfer the claim of the city to plaintiff. I am also of the view that it was the object and purpose of the transaction to prosecute the claim in plaintiff's name for the benefit of the city and to make the plaintiff a gift of whatever amount might be realized above the expense of litigation and the amount the city had paid her on account of her husband's death, hence the demurrer should have been sustained.

ROSENBERRY, J. I concur in the above opinion of Mr. Justice SIEBECKER.

BUGAJSKI, Respondent, vs. MILWAUKEE WESTERN FUEL COMPANY, Appellant.

March 17—April 11, 1916.

Master and servant: Injury caused by latent danger: Warning: Duty of master: Delegation to foreman: Evidence: Variance: Harmless error.

1. **The duty of an employer to warn and instruct an employee as to hidden or latent dangers of the employment which are known to the employer and unknown to the employee, is one which cannot be delegated.**
2. **Thus, in this case, although the defendant company had put into effect a positive rule prohibiting its foreman from assigning inexperienced men to work at a niggerhead by means of which and a wire cable cars were moved in and about its coal docks and yards, it was nevertheless liable for negligence of such foreman in setting the plaintiff, an inexperienced laborer, to operate such niggerhead without warning or instruction as to the latent dangers incident to such operation,—it appearing that the foreman had authority to select men and break them in as operators and that plaintiff was subject to his direction. *Gereg v. Milwaukee G. L. Co.* 128 Wis. 35, distinguished.**
3. **Although there was no allegation in the complaint as to defective condition of the tracks on which cars were being moved at the time of the accident, the admission of evidence as to their condition was, if error, not prejudicial to defendant.**

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

On March 31, 1911, the plaintiff was employed by the defendant as a laborer in and about its coal docks and yards in the city of Milwaukee. The defendant maintained a sidetrack extending in an easterly and westerly direction adjacent to its coal shed, from which shed cars were loaded with coal by means of hoppers and spouts, and in the process of loading the cars it was necessary that they be moved along the track and spotted as desired. This was done by means of a long wire cable, one end of which was wound around a horizontal iron spool called a niggerhead, to which power was imparted,

and the other end of the cable attached to the car to be moved along the track. In operating the niggerhead it is necessary that a man stand behind it with his hands upon the wire cable to hold the cable taut and remove it from the niggerhead as the car approaches. Plaintiff was thus engaged when the cable suddenly jerked and slipped and became involved in his clothing, his hand was drawn in between the cable and the niggerhead, and his body thrown against the cable, as a result of which his left hand and arm were severed and four ribs broken and his body and head otherwise bruised.

The complaint charged the defendant with negligence by reason of its failure to properly guard the niggerhead and the drum and shafting in connection therewith, for failure to furnish a safe cable, and for failure to warn plaintiff of the dangers incident to his employment, the complaint further alleging that previous to the day of the accident plaintiff had been employed by defendant as a common laborer only and had never worked around machinery and was not familiar with its operation, and that on this day he was directed by defendant's foreman to work at the niggerhead without warning or instruction in reference thereto. The answer of the defendant was a general denial. The jury, by its answers to questions submitted on a special verdict, found in favor of the plaintiff and assessed his damages at $5,000. From a judgment entered in accordance with such verdict defendant appeals.

For the appellant there was a brief by *Doe, Ballhorn, Wilkie & Doe,* and oral argument by *H. M. Wilkie* and *J. B. Doe.*

For the respondent there was a brief by *J. C. Kleczka* and *Glicksman, Gold & Corrigan,* and oral argument by *Mr. W. L. Gold* and *Mr. Kleczka.*

ROSENBERRY, J. This case was before this court on a former appeal and it was there held that the evidence, which was not substantially different from the evidence now before us,

was sufficient to take the case to the jury upon the issuable facts, and were that not the case we could not say that there is no credible evidence to support the verdict. *Bugajski v. Milwaukee Western F. Co.* 158 Wis. 454, 149 N. W. 277.

The defendant earnestly contends that its motion for judgment in its favor notwithstanding the verdict should have been granted, for the reason that "there is no evidence of any breach of any duty of defendant toward plaintiff. Defendant is not responsible for the negligence of Fisher or Budner, fellow-servants of plaintiff."

The defendant claims that by making and putting into effect a positive rule prohibiting Fisher or Budner from assigning inexperienced men to work at the niggerhead it discharged its duty to the plaintiff and was not liable for any negligence of Fisher or Budner in putting the plaintiff to work at the niggerhead without warning or instructions. It appeared that the foremen, while forbidden to send inexperienced men to work at the niggerhead, were authorized to select men and to break them in as operators, and that the plaintiff was subject to the direction of the foreman Fisher at the time of his injury. The question of whether or not the defendant is liable depends upon whether the duty to warn the plaintiff under all the circumstances was one which it might delegate to its foremen. The defendant claims it was such a duty and relies upon the case of *Gereg v. Milwaukee G. L. Co.* 128 Wis. 35, 107 N. W. 289, as sustaining its position in that respect.

We think this case is clearly distinguishable from the *Gereg Case,* and for this reason: The danger to which the plaintiff in that case was subject was one as well known to the plaintiff as to the defendant. There was nothing latent or hidden about it; it was perfectly obvious. The foreman having been instructed to warn the workman of the approaching car and having undertaken the performance of that duty, and it appearing that he was competent to perform the same, his

negligence in failing to give the warning in accordance with his instructions was that of a fellow-servant. In the instant case the danger was hidden, latent, unknown to the plaintiff and known to the defendant, and it was the defendant's duty to warn and instruct the plaintiff in respect thereto, and it has been repeatedly held that an employer's duty in this respect cannot be delegated, and that the person charged with the duty of giving the warning or instruction stands in the place of the employer. *Wysocki v. Wis. Lakes I. & C. Co.* 121 Wis. 96, 98 N. W. 950; *Gussart v. Greenleaf S. Co.* 134 Wis. 418, 114 N. W. 799; *Schmolt v. H. W. Wright L. Co.* 145 Wis. 577, 130 N. W. 499; 4 Labatt, Mast. & Serv. (2d ed.) § 1508.

It being established by the verdict that the plaintiff was set to work at the niggerhead without warning or instruction, the duty to give such warning being one which the defendant could not delegate, it necessarily follows that the defendant is liable for the negligence of its servant in that respect.

The defendant further contends that the trial court erred in admitting evidence as to the condition of the railway tracks on which the cars were being moved at the time of the accident. While there is no allegation in the complaint that the railway tracks were defective or that any defective condition of the tracks contributed to the injury, we cannot say that under the circumstances of this case the admission of this evidence constituted reversible error, if error it was.

By the Court.—Judgment affirmed.

SPENCE, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

March 17—April 11, 1916.

Street railways: Automobiles: Collision: Contributory negligence: Directed verdict.

In an action for personal injuries sustained when plaintiff's electric automobile was struck by a car while crossing the tracks of a street railway, it is *held*, upon the evidence, that the trial court was not clearly wrong in directing a verdict for defendant on the ground that plaintiff was conclusively shown to have been guilty of contributory negligence in failing to see and avoid the approaching car.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

Action to recover for a personal injury on the ground of negligence. Defendant put in issue the claim of negligence and pleaded contributory negligence of plaintiff.

It was undisputed that one of defendant's street cars collided with an electric automobile, while being operated by plaintiff, whereby she was injured. That happened July 13, 1914, in the daytime. Plaintiff was alone in the automobile. She was perfectly familiar with the situation. She was proceeding in a northerly direction on Hackett avenue in the city of Milwaukee, purposing to cross Folsom place on which defendant operated a double-track electric street railway system. The south track was for cars going east, and the north one for those going west. The accident happened as the automobile entered the north track.

The evidence showed that when plaintiff reached a point about eighty feet south of the south track and thereafter up to the time of the collision, unless interfered with by a car going east on the south track, she could have seen a car approaching on the north track for a distance east of a block and a half; that just before she reached that point when she could not see

so far east by reason of the view being obstructed by a building on her right, she looked east and did not see any car; that she did not look again until she was within a few feet of the south track when she said she took a glance to the east and did not see any car; that about as she reached the point eighty feet from the south track, a car going east thereon passed over the crossing. There was much evidence as to where the car going east and the one which did the damage passed each other, to the effect that it was about half a block east of the crossing.

At the close of the evidence a verdict was directed in defendant's favor upon the ground that plaintiff was conclusively shown to have been guilty of contributory negligence. Judgment was rendered accordingly and plaintiff appealed.

For the appellant there was a brief by *Doe, Ballhorn, Wilkie & Doe,* and oral argument by *J. B. Doe* and *H. M. Wilkie.*

For the respondent there was a brief by *Van Dyke, Shaw, Muskat & Van Dyke,* and oral argument by *James D. Shaw.*

MARSHALL, J. Counsel for appellant recognize the rule precluding the judgment complained of from being disturbed unless the trial judge was clearly wrong in holding that when she approached the street-car tracks and was where she could easily have seen the west-bound car in time to avoid going into the zone of danger, she failed to see it and avoid the danger, and that such rule must be applied, presuming that the judge possessed superior advantages for understanding the situation dealt with to those afforded by reading the record of the trial; but it is contended that there is room in the evidence for reasonable conflicting views as to whether appellant had an opportunity to see the coming car after she arrived at a point fifteen feet or so from the south track or for some little time theretofore or in time to avoid the danger.

Counsel appear to base the contention indicated upon the theory that there was evidence warranting reasonable belief

that when appellant last looked east for a coming car and for some little time before, including while she was passing over the space where she could have slackened the speed of her car or stopped it so as to have avoided the danger, the west-bound car was obscured from her view by the car going east, especially in view of her evidence that she looked east on the north track when near the south track and did not see any car, and that such evidence must have been overlooked or due weight not accorded thereto.

The trouble with counsel's contention is twofold: first, appellant does not seem, from her evidence, to have looked east for any car that might be coming on the north track when she reached its vicinity with any reasonable degree of care,—she testified that she glanced to the east; second, had she testified, positively, that she looked for a coming car when she was at the point where she said she glanced east and none was in sight, that would not have created a conflict for jury interference if a physical situation existed showing that the car must have been then in plain sight. The trial court evidently was of the opinion that the evidence conclusively established the existence of such a situation and, therefore, that either appellant did not look east at all when she reached the vicinity of the track, or did not look with any reasonable degree of care and, in that, we are unable to conclude that error was clearly committed.

From the time the east-bound car passed over the crossing before appellant reached the point where it is claimed that she looked east and the pretty clear evidence, which harmonizes therewith, that the two cars passed each other at a distance of about half a block from the crossing, the conclusion was evidently reached that there must have been afforded a clear view of the north track for some 120 feet east, when she was at and just before she reached the point where she said she glanced east and did not see any coming car.

It may be the trial judge placed the distance appellant had

a clear view of the north track to the east rather large; but we cannot see our way clear to decide that he was clearly wrong in the idea that the east-bound car ceased to interfere with appellant's seeing the coming car in ample time for her to have avoided invading its pathway, had she looked in the direction of such car when she was fifteen feet or so south of the south track or when she had time to avoid the danger. Furthermore it seems quite conclusive that appellant had ample opportunity for seeing the coming car before her view was interfered with by the east-bound car and ought to have done so. Having seen a car pass over the crossing when she was some eighty feet therefrom, and further attention to whether a car was approaching on the south track rendered unnecessary, ordinary prudence required her to look east for any car which might be coming on the north track when she had a clear view in that direction for a block and a half and not wait until there was danger of such a car being obscured from her view by the east-bound car.

We have said more than is needful in giving our reasons why we have been unable to reach the conclusion that the decision complained of is clearly wrong; but counsel for appellant presented the matter with such confidence as to seem to merit such response as is here made. The case from all the viewpoints counsel have suggested has been carefully considered resulting in the conviction that the judgment should be affirmed.

By the Court.—The judgment is affirmed.

LESH, Appellant, vs. ILLINOIS STEEL COMPANY and another, Respondents.

March 18—April 11, 1916.

Workmen's compensation: Continuing disability: When not "proximately caused by accident:" Refusal to submit to operation.

Where an applicant under the Workmen's Compensation Act unreasonably refuses to undergo a safe and simple surgical operation which is fairly certain to result in a removal of the disability and is not attended with serious risk or pain and is such as an ordinarily prudent and courageous person would submit to for his own benefit and comfort if no question of compensation were involved, the disability which the claimant suffers thereafter, a reasonable time being allowed for recovery, is not proximately caused by the accident, but is the direct result of such unreasonable refusal; and he is not entitled to compensation therefor.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The appeal is from a judgment affirming an order of the *Industrial Commission.* The applicant, *Charles Lesh,* on March 22, 1913, sustained an injury to the left leg just above the ankle, which later developed into an ulcerous process. From the date of the injury to May 5th following he had been on and off duty, being treated meanwhile by the physician of the *Illinois Steel Company,* his employer. On the last named date it was claimed by the employer that he had fully recovered from the disability which resulted proximately from the injury, the company claiming that the ulcerous condition was tubercular and not the direct result of the injury. On July 5, 1913, the matter was before the *Industrial Commission* for hearing, and without a formal order of the *Commission* the company consented to follow its directions and provided the necessary surgical and medical treatment and continued compensation until April 20, 1914, at which time the applicant returned to work as a watchman and continued

to be so employed until November 20, 1914. On the last named date he was offered work of the kind he was doing when injured; but he refused to accept it and claims compensation since April 20, 1914, and for permanent disability. The contested question in the case was whether the disability from which the applicant was suffering at the time of the second hearing, March 3, 1915, was proximately caused by the accident or was the result of the applicant's refusal to submit to proper medical treatment. Upon the hearing three physicians and surgeons were sworn, as well as the applicant. The *Commission* made and filed the following findings of fact and dismissed the application:

"That on the 22d day of March, 1913, the applicant and the respondent were both subject to the provisions of ch. 50, Laws of Wisconsin for 1911; that on said date, while in the employ of the respondent company and while engaged in performing services growing out of and incidental to such employment, the applicant sustained an accident resulting in his personal injury; that such injury was proximately caused by the accident and was not the result of wilful misconduct; that as a result of such accident he was substantially totally disabled until April 20, 1914, and was paid full compensation for such disability; that such, if any, disability as he sustained after April 20, 1914, resulted directly from his own wilful refusal to submit himself to safe and simple medical treatment; that in so far as his accident is concerned he is able to do and perform the same work at which he was engaged at the time of the accident."

The applicant appealed to the circuit court for Dane county, which affirmed the award of the *Commission,* and applicant brings this appeal.

For the appellant there was a brief by *Aarons & Niven,* and oral argument by *C. L. Aarons.*

For the respondent *Illinois Steel Company* there was a brief by *Vroman Mason,* attorney, and *Knapp & Campbell* and *William Beye,* of counsel, and oral argument by *Mr. Mason.*

For the respondent *Industrial Commission of Wisconsin* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

ROSENBERRY, J. The award of the *Commission* is attacked upon two grounds: first, that the *Commission* acted in excess of its powers for the reason that there was no evidence before it sufficient to give it jurisdiction in the premises; and second, that the findings of fact made by the *Commission* do not support the order and award.

As to the first ground, we have no difficulty in deciding that the *Commission* did not exceed its powers, for the reason that there was abundant evidence not only to give it jurisdiction but to sustain its findings.

A consideration of the second ground, however, involves the question whether or not under the Workmen's Compensation Act a continuing disability due to the wilful refusal of the claimant to submit himself to safe and simple medical treatment is proximately caused by accident.

While not directly found by the *Commission,* it is undisputed that the disability from which the applicant was suffering at the time of the hearing and from which he had suffered since April 20, 1914, and which the *Commission* found would be relieved by a simple surgical operation, was due primarily to the accident complained of. It appears from the evidence, without dispute, that the applicant was operated upon in August, 1913, to relieve a condition of his leg resulting from the accident, and that prior to this operation he was supposed to be suffering from tubercular difficulty, but an application of the Wasserman test showed that he was syphilitic. The *Commission* in its memorandum decision says:

"Subsequent tests have disclosed a still more serious condition as the predisposing cause of the disability he was suffering in 1913, and while it does not change the legal rights of the applicant, it is a reason why he should be held to a strict

accountability for any failure to submit himself to safe and proper medical treatment to relieve his disability."

Subsequent to the operation a nodule developed near the scar, involving a superficial nerve, and it appears without question that the medical treatment referred to and necessary for the applicant's relief consists in a slight surgical operation to remove the nodule.

The provisions of the Workmen's Compensation Act under which the applicant claims are:

"Section 2394—3. Liability for the compensation hereinafter provided for, in lieu of any other liability whatsoever, shall exist against an employer for any personal injury accidentally sustained by his employee, and for his death, in those cases where the following conditions of compensation concur:

"(1) Where, at the time of the accident, both the employer and employee are subject to the provisions of sections 2394—3 to 2394—31, inclusive.

"(2) Where, at the time of the accident, the employee is performing service growing out of and incidental to his employment.

"Every employee going to and from his employment in the ordinary and usual way, while on the premises of his employer, shall be deemed to be performing service growing out of and incidental to his employment.

"(3) Where the injury is proximately caused by accident, and is not intentionally self-inflicted."

From an early date this court has recognized and consistently applied the principle that an injured person cannot recover damages caused by such person's own negligence and imprudence after injury, and that where one has rendered the consequences of the wrongful act complained of more severe or injurious by some voluntary act which it was such person's duty to refrain from, or if by neglect the person has failed to exert himself reasonably to eliminate the injury and prevent the damages and has thereby suffered some additional injury, he cannot recover such damages as are to be attributed to such acts or omissions. *Weisenberg v. Appleton,* 26 Wis.

56; *Salladay v. Dodgeville,* 85 Wis. 318, 327, 55 N. W. 696; *Selleck v. Janesville,* 100 Wis. 157, 163, 75 N. W. 975; *Patry v. C., St. P., M. & O. R. Co.* 82 Wis. 408, 415, 52 N. W. 312; 1 Thomp. Comm. on Neg. § 202.

While the specific question as to whether or not one may recover for damages continued or due to his refusal to submit to a surgical operation has not been directly before this court, it has been considered by the courts of many other jurisdictions. See *Donovan v. New Orleans R. & L. Co.* (132 La. 239, 61 South. 216) 48 L. R. A. N. S. 109, and cases cited under head "Duty to submit to operation," p. 111; *Leitzell v. D., L. & W. R. Co.* 232 Pa. St. 475, 81 Atl. 543; *Martin v. Pittsburgh R. Co.* 238 Pa. St. 528, 86 Atl. 299; *Lobban v. Wabash R. Co.* 159 Mo. App. 464, 141 S. W. 440; *United R. & E. Co. v. Dean,* 117 Md. 686, 84 Atl. 75; *Tiggerman v. Butte,* 44 Mont. 138, 119 Pac. 477; *Joseph Schlitz B. Co. v. Duncan,* 6 Kan. App. 178, 51 Pac. 310; *Bailey v. Centerville,* 108 Iowa, 20, 78 N. W. 831; *O'Donnell v. Rhode Island Co.* 28 R. I. 245, 66 Atl. 578; *Missouri, K. & T. R. Co. v. Aycock* (Tex. Civ. App.) 135 S. W. 198; *Birmingham R., L. & P. Co. v. Anderson,* 163 Ala. 72, 50 South. 1021; *Ward v. Ely-Walker D. G. B. Co.* 248 Mo. 348, 154 S. W. 478; *Harding v. Ostrander R. & T. Co.* 64 Wash. 224, 116 Pac. 635.

The general rule is perhaps as well stated in *Joseph Schlitz B. Co. v. Duncan,* 6 Kan. App. 178, 181, 51 Pac. 310, 311, as in any of the cases cited. In that case Duncan was run over by a brewery wagon, the property of the defendant, injuring his leg in such a way that his heel did not reach the floor. It was claimed that the condition could be remedied by a surgical operation. The court said:

"The next allegation of error is that the court withdrew from the jury all evidence as to the probable result of a surgical operation. This, we think, was error, as the probabilities of a cure of the disability would, to some extent, affect the amount of damages. This should have been allowed to go to the jury and be weighed by them in assessing the amount of

recovery, as should also the probable expense attending such an operation. This is not in mitigation of damages, but a part of the method of showing the actual damages sustained. If the plaintiff could be certainly cured by an operation that was safe and inexpensive, that would surely be a less serious injury than one for which there was no hope; and to the degree that the certainty, safety, and inexpensiveness of a cure could be assured, in such a degree would the actual damages decrease."

While the decisions of different courts were placed upon different grounds, the result reached in every case was that the injured person would not be allowed to recover damages caused by his own negligent act or wilful misconduct, but only those which were caused directly or proximately by the injury itself. The question under consideration here has arisen many times under the English compensation act. The following rule was laid down by Lord M'LAREN in *Donnelly v. Baird,* Scotch Sess. Cas. [1908] 536:

"In view of the great diversity of cases raising this question, I can see no general principle except this: that if the operation is not attended with danger to life or health or extraordinary suffering, and if, according to the best medical or surgical opinion, the operation offers a reasonable prospect of restoration or relief from the incapacity from which the workman is suffering, then he must either submit to the operation or release his employers from the obligation to maintain him. In other words, the statutory obligation of the employer to give maintenance during the period of incapacity, resulting from the accident is subject to the implied condition that the workman shall avail himself of such reasonable remedial measures as are within his power."

See notes in 48 L. R. A. N. S. 111, and L. R. A. 1916A, 139, 387, where a large number of cases bearing upon this subject are collected.

The same question has arisen under the New Jersey workmen's compensation act, the workmen's compensation act of Maryland, and the Michigan workmen's compensation act, in

which cases the English rule stated above has been referred to and approved, and applied with varying results. *McNally v. H. & M. R. Co.* (N. J. Law) 95 Atl. 122; *Floccher's Case,* 221 Mass. 54, 108 N. E. 1033; *Jendrus v. Detroit S. P. Co.* 178 Mich. 265, 144 N. W. 563, L. R. A. 1916A, 381.

In the determination of this question we should bear in mind the declared purposes of the law under consideration, which have been stated by this court as follows:

"Under the statutory system for dealing with personal injury losses incident to performance of the duties of an employer, they are regarded as mutual misfortunes to be charged up, as directly as practicable, to the cost of production. The right to have the employer regarded as an agency to make payment to the employee and absorb the same as an expense of the industry, regardless of whether the loss is attributable to any human fault, is a legislative creation within the constitutional exercise of the police power to legislate for the public welfare. It is not a charity, but the recognition of a moral duty and the erection of it into a legal obligation of the public, not of the mere employer, to compensate, reasonably, those who are injured in the employment of others, as a part of the natural, necessary cost of production; that obligation being discharged through the agency of the employer. . . . The more clearly it is appreciated that the basic logic of the law is mutuality of interest between employers, employees, and the public, and that each actor is charged with the duty of promoting the mutual interests, the more apparent the high ideal the legislature had in mind in creating the new system, and the greater the prospect of such ideal being realized." *Milwaukee v. Miller,* 154 Wis. 652, 670, 671, 144 N. W. 188.

With this in mind, this court defined the term "where the injury is proximately caused by accident" as follows:

"But when, as under the Compensation Act, no act of negligence is required in order to recover, the element of negligence, namely, reasonable anticipation, contained in the term 'proximate cause,' must be eliminated therefrom, and the phrase 'where the injury is proximately caused by accident,' used in the statute, must be held to mean caused in a physical sense, by a chain of causation which both as to time, place,

and effect is so closely related to the accident that the injury can be said to be proximately caused thereby." *Milwaukee v. Industrial Comm.* 160 Wis. 238, 246, 151 N. W. 247.

In this connection, if we read for the word "injury" the word "disability," which is by the terms of the act the thing compensated for, and adopt the definition of "proximately caused" laid down by the court, we have the following: Where the disability is so related to the accident that it is the natural consequence thereof, then compensation should be awarded.

Where, as in this case, the applicant under the Workmen's Compensation Act unreasonably refuses to undergo a safe and simple surgical operation which is fairly certain to result in a removal of the disability and is not attended with serious risk or pain and is such as an ordinarily prudent and courageous person would submit to for his own benefit and comfort, no question of compensation being involved, the disability which the claimant suffers thereafter, a reasonable time being allowed for recovery, is not proximately caused by the accident, but is the direct result of such unreasonable refusal.

No question of compelling the applicant to submit to an operation is involved. The question is: Shall society recompense a workman for a disability caused by his unreasonable refusal to adopt such means to effect a recovery as an ordinarily prudent person would use under like circumstances and which would result in the removal of the disability within the rule as stated above? It is true that the compensation awarded under the terms of the act is not damages in the technical sense, and that the rules relating thereto are not to be applied in cases arising under this act, and cases have been cited simply for the purpose of showing that damages accruing as a direct result of the claimant's unreasonable refusal to submit to reasonable medical and surgical treatment, where the results are fairly certain, were not even in tort cases held to be proximately caused by the accident.

The proposition that an applicant, under the provisions of

this humane law, may create, continue, or even increase his disability by his wilful, unreasonable, and negligent conduct, claim compensation from his employer for his disability so caused, and thereby cast the burden of his wrongful act upon society in general, is not only utterly repugnant to all principles of law, but is abhorrent to that sense of justice common to all mankind. The findings of the *Commission* in this case, which are abundantly supported by the evidence and affirmed by the lower court, bring the applicant in this instance clearly within the rule above stated.

By the Court.—Judgment affirmed.

STOUGHTON WAGON COMPANY and another, Appellants, vs. MYRE and another, Respondents.

March 18—April 11, 1916.

Workmen's compensation: Relative injury clause: Construction: Partial loss of vision.

Under that part of sub. (5), sec. 2394—9, Stats., generally referred to as the relative injury clause,—providing for compensation which "shall bear such relation to the amount" stated in the schedule "as the disabilities bear to those produced by the injuries named in the schedule,"—an employee whose injuries resulted in the permanent loss of four fifths of the vision of one eye, but did not affect his earning capacity, was properly awarded indemnity to the amount of four fifths of the allowance provided in the schedule for "total blindness of one eye." *Northwestern F. Co. v. Industrial Comm.* 161 Wis. 450, distinguished.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action to set aside an award made by the *Industrial Commission* under the Workmen's Compensation Act. The facts were that the defendant *Myre,* October 24, 1914, while performing service in the employ of the plaintiff *Wagon Company* (both being subject to the provisions of the Workmen's

Compensation Act, secs. 2394—1 to 2394—31, Stats. 1913), was struck in the left eye by the head of a bolt, causing injuries which resulted in the permanent loss of four fifths of the sight of that eye. His earning capacity was not affected by the injury. The *Industrial Commission* awarded him indemnity for the loss of vision under the provisions of sub. (5), sec. 2394—9, Stats., holding that the claimant was entitled to four fifths of the allowance prescribed by that subdivision for "total blindness of one eye" under the terms of that part of said subdivision generally referred to as the relative injury clause, which says that "in all other cases in this class" the compensation "shall bear such relation to the amount" stated in the schedule "as the disabilities bear to those produced by the injuries named in the schedule."

The section will be found quoted at length in the case of *Northwestern F. Co. v. Industrial Comm.* 161 Wis. 450, 152 N. W. 856, and need not be repeated here.

The award was affirmed by the circuit court and the plaintiffs appeal.

For the appellants there was a brief by *Quarles, Spence & Quarles,* attorneys, and *I. A. Fish,* of counsel, and oral argument by *Mr. Fish.*

For the respondent *Industrial Commission of Wisconsin* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

WINSLOW, C. J. It was held in *Northwestern F. Co. v. Industrial Comm.* 161 Wis. 450, 152 N. W. 856, that a partial and permanent impairment of the strength and usefulness of an arm was not within the class of injuries scheduled in sub. (5), sec. 2394—9, Stats. 1913, because that schedule referred to the physical loss of an arm, and mere impairment without loss of the member could not be held to be in that class.

The case before us, however, is plainly not within that rea-

soning. The schedule gives a certain compensation for total blindness of one eye, the physical organ itself being retained, and in the present case there is partial blindness of the eye, the physical organ being retained. The court is of opinion that this injury is logically within the statutory class and hence that compensation under the relative injury provision of the statute was properly awarded.

The relative injury clause in question has been amended by ch. 378, Laws 1915, so that there is now no doubt of the legislative purpose to make it applicable to all cases of permanent disability resulting from injuries to those members of the body or its faculties named in the schedule although the member be not severed or the faculty totally lost.

By the Court.—Judgment affirmed.

MILEY and others, Respondents, vs. HEANEY, imp., Appellant, and FIRST TRUST COMPANY, Trustee, Respondent.

March 18—April 11, 1916.

Pleading: Cross-complaint: Facts, how stated: When pleadable: Parties: Joinder of causes of action: Issues: Separate trials by court and jury.

1. A cross-complaint, like other pleadings under the Code, should state the material facts plainly and concisely in ordinary language, without unnecessary repetition. It should not follow the ancient forms which were superseded by the Code.
2. In an action to foreclose an assignment executed by defendant H. H. of all her interest in her father's estate as collateral security for the payment of notes aggregating $110,000 given by her to plaintiff M., the complaint alleged, among other things, that a part of said notes had been transferred to the other plaintiffs; that payment of the notes was guaranteed by the defendant E. H.; that $23,920.02 had been paid thereon; that a certain corporation in which defendants H. H. and E. H. were stockholders had been adjudged bankrupt; and that the trustee in bankruptcy claimed to be entitled to recover from plaintiff M. and said de-

fendants said amount of $23,920.02 on the ground that it had been paid out of funds of the corporation unlawfully and in fraud of creditors. Defendant H. H. admitted that she executed the notes and assignment, but alleged that she did so as surety for defendant E. H. and that they were given in part payment for stock in the corporation above mentioned and were procured through fraud on the part of the plaintiff M.; and by counterclaim she demanded their surrender and cancellation. The trustee in bankruptcy, having been made a party on the application of plaintiffs, interposed a cross-complaint demanding recovery from plaintiff M. and defendant H. H. of $15,127.85, alleged to be a debt of M., assumed by defendant H. H., to the bankrupt corporation, and also recovery from M., H. H., and E. H. of said $23,920.02 alleged to have been paid on the notes in fraud of the corporation's creditors. On demurrer by defendant H. H. to the cross-complaint, it is *held* that the claims of the respective parties are so interrelated that a determination of the right to a recovery of the two sums last mentioned and the liability therefor must be had in order to settle the questions involved in the issues between plaintiffs and the defendants H. H. and E. H.; that the trustee in bankruptcy was properly made a party under secs. 2619, 2656*a*, Stats.; and that the cross-complaint states two causes of action which may be joined and are properly pleadable as cross-demands in the action.

3. The practice permitting the bringing in of new parties and the pleading of cross-demands, under secs. 2610, 2656*a*, Stats. 1915, does not deprive parties of their rights to a jury trial, since under sec. 2844, Stats., where a jury issue is presented in connection with an equitable issue, the trial court may direct which shall be first tried, according to the rights of the parties under sec. 2843.

APPEAL from an order of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

This is an action to foreclose on an assignment given by *Helen Heaney* covering all of her interest in the estate of Philipp Jung, deceased, to secure the payment of fifteen promissory notes falling due on various dates on and between July 4, 1913, and July 4, 1926.

The substance of the complaint is set out in the brief of plaintiffs and respondents and is as follows:

"The complaint sets out the death of Philipp Jung, testate, a copy of and probate of his will, appointment of the trustees,

and final decree transferring to them the residue of his estate, amounting to over $600,000; the execution and delivery of the $110,000 of notes by *Helen Heaney* to *Miley*, the guaranty of payment thereof by Edward Heaney, the execution and delivery to *Miley* by *Helen Heaney* of the assignment of her interest in her father's estate as collateral security for the payment of the notes, the transfer of five of the notes by *Miley* to his coplaintiffs, the payments of $23,920.02 made on the notes, the bankruptcy of the Barrett Company and the appointment of the *First Trust Company* as its trustee, the claim of the latter that the payments on the notes were made out of the funds of the Barrett Company without authority of law and in fraud of its creditors, and that the *First Trust Company*, as such trustee, is entitled to recover the amount so paid from *Miley* and the Heaneys, the claim of the trustees under the will of Jung that the said assignment by *Helen Heaney* of her interest in her father's estate to *Miley* is illegal and void and their refusal to recognize *Miley* or his assigns as having any right, title, or interest in the trust estate or its income, the assignment by *Helen Heaney* to Wilmanns of her interest in her father's estate, subject to her assignment to *Miley* as collateral security to a loan of which $3,000 remains unpaid, and that the Heaneys are now entirely solvent.

"The prayer of the complaint is that the assignment of *Helen Heaney* to *Miley* of her interest in her father's estate and the trusts created by his will be adjudged valid and that the trustees of and under said will be enjoined and commanded to treat such assignment as valid in all respects, that the amount due, owing, and unpaid on the notes be ascertained, that the Heaneys be required to pay the same with costs of the action within a time fixed by the court, and that in default thereof the interest of *Helen Heaney* in her father's estate be foreclosed by sale had under the direction of the court, that the plaintiffs have judgment for deficiency against the defendants Heaney, that Wilmanns be barred of all right or interest in the property sold, and that the plaintiffs have such other and further relief as shall be just."

Helen Heaney by her answer and amended answer admits the execution of the notes and assignment and alleges that she did so as surety for her husband, and that the assignment

and notes had been procured through fraud, and prays that the complaint be dismissed. She alleges by way of counterclaim that the execution of these papers was the result of fraud and demands the surrender and cancellation of the notes and assignment.

The plaintiffs put in issue the principal allegations of the counterclaim. It is alleged that the notes were given in part payment of the purchase price of *Miley's* stock in the Barrett Company, and there is no allegation in either the complaint or the reply to the counterclaim that *Mrs. Heaney* agreed to pay any indebtedness owing by *Miley* to the Barrett Company.

On August 28, 1915, as trustee in bankruptcy of the G. M. Barrett Company, the *First Trust Company* was joined as a party defendant by an *ex parte* order on the application of the plaintiffs. This trustee in bankruptcy interposed an answer and cross-complaint demanding relief against the plaintiff *Miley* individually, and against him and *Helen Heaney* and Edward Heaney for the recovery of $39,047.87 which it alleges is due from them severally or jointly to the G. M. Barrett Company, bankrupt. The answer and cross-complaint state the facts for relief in favor of this trustee in bankruptcy in the form of six separate causes of action for the recovery of two items, one for $15,127.85 and another for $23,920.02 against the plaintiff *Miley* and the defendants *Helen* and Edward Heaney either separately and individually or against them jointly according to the nature of the liability. The pleader has adopted the practice of repeating the allegations of each such cause of action to conform to the forms that existed before the adoption of the Code. He charges the right to recover for the $15,127.85, first, as a recovery in the form of a debt of *Miley* owed to the Barrett Company individually, and second, as a recovery thereof in the form of *Miley's* debt which *Helen Heaney* assumed to pay, but to which the Barrett Company at no time consented. The recovery of the

$23,920.02 is set forth as four causes of action. First, recovery thereof from *Miley* as for money advanced and goods sold him at his request; second, recovery thereof from *Miley* individually as for money and goods received to his use; third, recovery thereof from *Miley* and *Helen* and Edward Heaney upon the ground that they misappropriated money and merchandise of the Barrett Company for the benefit of *Miley,* who received it in fraud of the creditors of the Barrett Company; fourth, recovery thereof upon the ground that the Barrett Company loaned money and sold merchandise to *Miley* between July 4, 1913, and January 19, 1915, to this amount, which he agreed to pay, and that *Helen Heaney* for a valuable consideration agreed to pay this debt for him.

The defendant *Helen Heaney* demurred to the cross-complaint, the following being material to consider: (1) that the same causes of action are not pleadable as a cross-complaint and that the matters alleged do not affect the contract, transaction, or property which is the subject matter of the action; (2) that several causes of action have been improperly embraced in the cross-complaint; and (3) that the facts stated do not constitute causes of action. This demurrer is substantially repeated as to separate formal allegations of different causes of action. From the order overruling the demurrer this appeal is taken.

For the appellant there was a brief by *Miller, Mack & Fairchild,* and oral argument by *J. G. Hardgrove.*

Frank M. Hoyt, for the respondent plaintiffs.

For the respondent *First Trust Company,* as trustee in bankruptcy, there was a brief by *Flanders, Bottum, Fawsett & Bottum,* and oral argument by *Louis A. Lecher.*

SIEBECKER, J. The style and form of the cross-complaint seem to follow the formal precedents that existed under the rules of pleading before the adoption of our Code. The Code abolished all such formal and needless repetition in a plead-

ing. The style of pleading a cross-complaint as contemplated by sec. 2656*a*, Stats., is governed by the Code provision applicable to a complaint and an answer, namely, "A plain and concise statement of the facts constituting each cause of action, without unnecessary repetition" (sec. 2646, Stats.), and "A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition" (sec. 2655, Stats.). The significant requirements of these provisions are that a cause of action *shall be stated by alleging a plain and concise statement of the facts in ordinary language, without unnecessary repetition.* Compliance with these Code provisions is manifestly wanting in this cross-complaint. It plainly transgressed them by unnecessary repetition and by the failure to make but one plain and concise statement of the facts constituting the causes of action. The matters alleged in the cross-complaint constitute in substance two causes of action; one for the recovery of $15,127.85 and the other for the recovery of $23,920.02. A plain and concise statement of the facts material to the primary rights of each party to the action pertaining to these two claims and their primary duties in respect thereto meets all the calls of proper practice under our Code. The ancient and discarded practice which existed prior to the Code seized hold of external arbitrary features of a transaction, and treated these features as of substance and raised them to the dignity of separate and independent grounds of relief, though in substance they were bottomed on one primary right and one primary duty. A cross-complaint in compliance with the Code demanded only a plain and concise statement of the material facts for recovery of the two specified amounts on which the primary right of the trustee in bankruptcy is predicated and the facts showing a separate or joint duty of *Miley* and the Heaneys to pay the same. The alleged six separate causes of action in the cross-complaint constitute in substance but two causes of action, and the statement thereof as six separate

causes of action, by reverting to the ancient forms which have no place in our Code practice, added nothing to the substance of the pleading.

It is manifest that it is the purpose of the complaint and the answer and the cross-complaint to express one object, namely, to have the rights of the parties arising out of the subject matter adjudicated. The allegations of these pleadings show that each party to the action asserts rights and charges liabilities which relate to the transactions, contracts, and property involved and which, under the allegations, affect each party to the action. The legal claims of the respective parties are so interrelated that a determination of the right to a recovery of the two amounts in controversy and the liability for the same must be had to settle the questions involved in the issues raised between the plaintiffs and the defendants Heaney. In the light of this situation the trustee in bankruptcy was properly made a party to the action under secs. 2610 and 2656*a*, Stats. The allegations of the pleadings show that the matters embraced in the litigation are all intimately connected, that the demands of the cross-complaint are germane to the subject of the action, that the rights and liabilities of all the parties as shown by the pleadings can be determined in this action, and that under the facts and circumstances alleged a final determination of them is desirable. *Kollock v. Scribner,* 98 Wis. 104, 73 N. W. 776; *Harrigan v. Gilchrist,* 121 Wis. 127, 99 N. W. 909; *Warren Webster & Co. v. Beaumont H. Co.* 151 Wis. 1, 138 N. W. 102; *Hemenway v. Beecher,* 139 Wis. 399, 121 N. W. 150; *McCollom v. M., St. P. & S. S. M. R. Co.* 152 Wis. 435, 139 N. W. 1129; *Conway v. Zender,* 154 Wis. 479, 143 N. W. 162; ch. 219, Laws 1915, amending sec. 2610, Stats. 1915.

The objection that this practice deprives the parties of their rights to a jury trial is not well founded. If a jury issue is presented in connection with an equitable issue the court shall, in its discretion, under sec. 2844, Stats., direct

which shall be first tried, according to the rights of the parties under sec. 2843, Stats., prescribing by whom issues are triable.

From these considerations it follows that the cross-demands of the trustee in bankruptcy are properly pleadable, and that the facts alleged are sufficient to constitute two causes of action, and that the court properly overruled defendant's demurrer to the cross-complaint.

By the Court.—The order appealed from is affirmed.

DAHLGREN, Plaintiff in error, vs. THE STATE, Defendant in error.

March 18—April 11, 1916.

Criminal law: Information not confined to offense charged in complaint: Prior conviction not element of offense: Separate counts: Verdict.

1. Under sec. 4653, Stats., the district attorney in filing an information is not strictly confined to the particular offense stated in the complaint before the examining magistrate, even when the accused waived examination and no testimony was taken.
2. Under sec. 4736, Stats., the fact of a prior conviction and sentence of the accused must be stated in the information in order to warrant the punishment provided for in case of a second offense, but such fact is not an essential element of the substantive offense charged and does not alter the nature of that offense. Language in *Paetz v. State*, 129 Wis. 174, qualified.
3. The statement of the fact of a prior conviction and sentence does not constitute a separate count in the information, and it is not essential that the jury should pass upon it separately and specifically.

ERROR to review a judgment of the municipal court of Milwaukee county: A. C. BACKUS, Judge. *Affirmed.*

For the plaintiff in error there was a brief by *Rubin, Fawcett & Dutcher,* attorneys, and *W. B. Rubin,* of counsel, and oral argument by *W. B. Rubin.*

For the defendant in error there was a brief by the *Attorney General, Winfred C. Zabel,* district attorney, and *Andrew Gilbertson,* assistant district attorney, and oral argument by *Mr. Gilbertson.*

KERWIN, J. The plaintiff in error, hereinafter called defendant, was convicted under sec. 4410, Stats., of burglary of an office building on the 14th day of March, 1915, and sentenced to five years in the state prison at Waupun, and brings the case here by writ of error.

The complaint before the examining magistrate charged that the defendant did unlawfully, feloniously, and burglariously break and enter an office building with intent to steal. No charge was made in this complaint of prior offenses. The defendant waived examination and was bound over.

The district attorney filed an information against the defendant for the offense stated in the complaint before the examining magistrate, and further informed the court in said information that on the 12th day of July, 1899, the defendant was convicted in the district court (Fourth judicial district) in the county of Hennepin, Minnesota, of the crime of burglary and upon said conviction sentenced to imprisonment in the state prison at Stillwater, Minnesota, for the term of five years, which conviction and sentence still remains of record and unreversed; and further informed the court that on the 12th day of July, 1899, the defendant was convicted in the district court (Fourth judicial district) in the county of Hennepin, state of Minnesota, of the crime of burglary and upon said conviction sentenced by said court to imprisonment in the state prison at Stillwater for the term of five years, said term to begin at the expiration of the term of confinement in said state prison to which the defendant theretofore and on said 12th day of July, 1899, had been sentenced, said cause being number 6009 of the files and records of said court, which conviction and sentence still remains of record and unreversed.

The learned counsel for defendant entered a plea in abatement to the effect that no examination had been had for the offense charged against the defendant in the information, the contention being that that part of the information relating to the convictions in Minnesota should have been stated in the complaint before the examining magistrate, and that no examination was ever had for the crime of which defendant was convicted. This contention involves the question as to whether or not the facts stated respecting former convictions in Minnesota are any part of the crime of which the defendant was convicted in the instant case.

In filing an information the district attorney is not confined to the crime stated in the complaint before the examining magistrate, but may file an information setting forth the crime committed according to the facts ascertained on such examination and from the written testimony taken thereon, whether it be the offense charged in the complaint on which the examination was had or not. Sec. 4653, Stats. It is true that in the instant case the defendant waived examination and no testimony was taken. But the statute plainly indicates that the district attorney is not strictly confined to filing an information for the particular offense stated in the complaint before the examining magistrate.

Moreover in the case at bar the information was filed for the crime stated in the complaint before the examining magistrate. The additional facts stated in the information respecting the trials and convictions in Minnesota were not of the substance of the offense charged, but simply affected the degree of punishment to be imposed. *Howard v. State,* 139 Wis. 529, 121 N. W. 133; *Ingalls v. State,* 48 Wis. 647, 4 N. W. 785; sec. 4736, Stats.

Counsel for defendant relies upon *Paetz v. State,* 129 Wis. 174, 107 N. W. 1090. This case, however, is not authority for counsel's contention. There the question arose as to sufficiency of the complaint or information on final trial, not on preliminary examination. While the decision in *Paetz v.*

State is correct, this language is used in the opinion: "Prior conviction was an essential element of the offense in a prosecution for a second offense." 129 Wis. 177. This language as laying down a general rule is not strictly correct. Prior conviction is an essential element of the charge in the information in order to secure the punishment provided for in case of a second offense and must be alleged in the information under the statute, sec. 4736, but it is not an essential element of the substantive offense charged. The statute, sec. 4736, provides:

"When any person is convicted of any offense punishable only by imprisonment in the state prison and it is alleged in the indictment or information therefor and proved or admitted on the trial that he had been before sentenced to punishment by imprisonment in any state prison, by any court of this state, or any other state or of the United States, and that such sentence remains of record unreversed, whether pardoned therefor or not, may be punished by imprisonment in the state prison not less than the shortest time fixed for such offense and not more than twenty-five years."

Point is also made by counsel for defendant that the proof made was not sufficient to sustain what he calls the second and third counts of the information, which relate to the convictions in Minnesota; and further contends that the jury should have passed specifically upon each of the so-called counts of the information. The fact is in the instant case there was but one count in the information, but one offense. The matter relating to the former convictions merely affected the severity of punishment and was not a part of the substantive offense with which the defendant was charged. The evidence was sufficient to prove all the allegations of the information and warrant conviction.

By the Court.—The writ of error is dismissed, and the judgment and conviction affirmed.

STATE EX REL. BOARD OF REGENTS OF NORMAL SCHOOLS vs. DONALD, Secretary of State.

April 15—April 21, 1916.

Statutes: Amendment: Implied repeal: Appropriations: Legislative intention: How determined: Normal schools: Unexpended balances.

1. The legislature can repeal a statute carrying an appropriation and thus put an end to the appropriation, so far as it is unexpended, at any time. If contracts are thereby breached the contractors must resort to other remedies; they cannot insist that the appropriation remains available simply because of an outstanding contract entered into on the faith of it.
2. As a general rule, where a statute rewrites a former statute and states that it "is amended so as to read as follows," all provisions in the original statute not found in the amending statute are repealed; but if it appear that the legislative intention was otherwise, such intention must prevail.
3. The legislative intention in such a case is to be determined from the nature and language of the amendment, from other acts passed at or about the same time, and from all the circumstances of the case.
4. The circumstances attending the enactment of ch. 633, Laws 1915, the fact that it expressly repeals certain other subsections of sec. 172—54, Stats. 1913, and the legislative history of the act, show affirmatively that there was no intention, in amending sub. 30 of said section "so as to read," to repeal the appropriations made in 1913 by said subsection for the normal school at Whitewater.

MANDAMUS to the Secretary of State. *Peremptory writ issued.*

The facts are stated in the opinion.

For the relator there was a brief by *Sanborn & Blake,* and oral argument by *John B. Sanborn.*

The *Attorney General,* for the defendant.

The decision of the court, denying the motion to quash the alternative writ and directing issuance of the peremptory

writ, was announced April 21, 1916, and the following opinion was filed May 2, 1916:

WINSLOW, C. J. This is a *mandamus* action brought originally in this court to compel the secretary of state to audit certain bills incurred by the *Normal School Regents* for the building of a gymnasium at the Whitewater normal school. The question presented on the motion to quash the alternative writ is whether sub. 30 of sec. 172—54, Stats. 1913, was repealed by ch. 633 of the Laws of 1915. Sub. 30 aforesaid reads as follows:

"30. There is appropriated on July 1, 1913, four thousand dollars, and on July 1, 1914, four thousand dollars, and on March 1, 1915, fifty thousand dollars, payable from any moneys in the normal fund income not otherwise appropriated, to the board of normal regents for educational apparatus, furniture and furnishings, library books, for a gymnasium and equipment, for land improvements and for other permanent property and improvements at the normal school at Whitewater." (1913)

By ch. 633 of the Laws of 1915, approved August 24th and published August 27th of that year, this subsection is "amended to read:"

"30. There is appropriated on July 1, * * * *1915,* * * *nine* thousand *seven hundred seventy-five* dollars and on July 1, *1916,* four thousand *four hundred seventy-five* dollars, * * * payable from any moneys in the normal fund income not otherwise appropriated to the * * * *state board of education* for * * * permanent property and improvements at the normal school at Whitewater. *Of the first appropriation, three thousand one hundred dollars shall be available only for purchase of land.*" (1915)

It appears by the petition for the writ that prior to December 31, 1914, the *Board of Normal School Regents,* with the approval of the governor, contracted for the excavation and concrete work for a gymnasium at the Whitewater school, which work was fully completed prior to July 1, 1915, and

the sum of $7,118 paid therefor in addition to architects' fees amounting to $1,544, said sums being paid out of the appropriations made by said sub. 30; also that thereafter the regents entered into contracts aggregating $37,067 for the completion of said gymnasium, which contracts were approved by the governor August 14, 1915, and were entered into on the basis of the availability therefor of the moneys appropriated by said sub. 30, there being an unexpended balance in said appropriation on July 1, 1915, of $45,437.89; that the bills in question here are certain bills amounting to $4,156.84 for a portion of the work of construction of said gymnasium under the last-named contracts, and that there are sufficient funds in said appropriation to discharge the same unless said appropriation was repealed by force of the amendment thereof by the rewriting of sub. 30 aforesaid by ch. 633 of the Laws of 1915.

Undoubtedly the legislature can repeal a statute carrying an appropriation and thus put an end to the appropriation, so far as it is unexpended, at any time. If contracts are thereby breached the contractors must resort to other remedies; they cannot insist that the appropriation remains available simply because of an outstanding contract entered into on the faith of it.

Undoubtedly, also, the general rule of construction is that, where a statute rewrites a former statute and states that the same "is amended so as to read as follows," all provisions in the original statute not found in the amending statute are repealed. *Ashland W. Co. v. Ashland Co.* 87 Wis. 209, 58 N. W. 235, and cases cited.

This is because the inference is necessarily strong that such was the legislative intention. The rule, however, is not ironclad. The idea of all such rules is to carry out the legislative intention, and if it appear that the legislative intention was otherwise the rule must go and the intention prevail. The rule is not sacred, but the intention is. The intention

"is to be determined from the nature and language of the amendment, from other acts passed at or about the same time, and from all the circumstances of the case." *Bank of Metropolis v. Faber,* 150 N. Y. 200, 44 N. E. 779.

Under the circumstances before us in the present case we think it quite certain that the amendment of 1915 shows no intention to repeal or revoke the unexpended balances of the appropriations carried by the original sub. 30, but rather the reverse. These circumstances will be briefly stated.

By ch. 758, Laws 1913, an attempt was made to bring together in logical order the fundamental provisions of law governing all the appropriations for the normal schools, the university, and the mining trade school, and in the volume of the statutes for the same year the attempt was first made to bring together all of the appropriation statutes into one coherent chapter numbered ch. 12*m*. Prior to this the appropriation statutes had been scattered through session laws and statutes without order or system. In this new chapter the provisions of ch. 758 aforesaid relating to normal school appropriations were embraced in sec. 172—54, which was subdivided into thirty-eight subsections. Of these subsections those numbered from 6 to 13 inclusive carried annual appropriations to each of the eight normal schools of the state for operating expenses; those numbered from 14 to 30 inclusive carried appropriations in varying sums for purchase of property real and personal, for permanent improvements, repairs, and maintenance. These last-named sections were not annual appropriations, but were all appropriations of a certain sum on July 1, 1913, and another certain sum on July 1, 1914, while some (as in the subsection before us) carried another certain sum on March 1, 1915. None of them, therefore, were lapsable appropriations under the rules of construction laid down in sec. 172—130, Stats. 1913.

The effort to bring together into one coherent chapter all the appropriation statutes is worthy of notice because it tends

to explain why the appropriations of 1915 were made in the form in which we find them. If the future biennial volumes of the statutes were to contain this chapter, the future appropriation laws must naturally take the form of amendments to the sections thereof, and so we find that the general appropriation act for the normal schools for 1915 (ch. 633, Laws 1915) consists of sections repealing certain subsections of sec. 172—54, Stats. 1913, and other sections amending certain of said subsections. Here also is a very significant fact. Ch. 633 opens with a section repealing in express terms sub. 14 to 21 inclusive and sub. 36 of sec. 172—54. Thus it is absolutely certain that the legislature had the subject of repeal in mind and that they used direct language appropriate to the purpose with regard to subsections last named. It would seem natural, therefore, that, if they intended to repeal any other sections, they would have adopted the same direct and unmistakable method.

The legislative history of the act, however, is quite conclusive on the subject of intention. The bill was introduced in the Assembly on August 2, 1915, by the joint finance committee. It was then in the same shape, so far as the features under consideration are concerned, as it was when finally passed. The entire subject had been given exhaustive and minute consideration by the committee, in the course of which there had been prepared for its use tables, or so-called "working sheets," showing the appropriations for the various normal schools made by the legislature of 1913, the unexpended balance in the fund of each school on July 1, 1915, the amounts carried by the bill, and (most significant of all) the aggregate sum of the unexpended balance and the proposed appropriation for the two years carried out in the last column under the heading "Totals for the biennium 1915–1917." In the case of the Whitewater normal school the unexpended balance of its capital fund is given in this table as $45,437.89, the appropriation for 1916 as $9,775, for 1917

as $4,475, making a total under the last heading of $59,687.89. These tables accompanied and explained the bill and formed in effect the report of the committee.

This really forbids the idea that there was any legislative intention of forfeiting or repealing the unexpended appropriations which existed July 1, 1915. Other appropriation bills of a similar character and introduced at about the same time had a like history. In all of them there were direct repealing clauses as to certain sections, and in certain cases of direct repeal there were saving clauses providing for the payment of claims lawfully incurred prior to the passage of the repealing act.

It does not seem necessary to go further. We conclude not merely that the intention to forfeit the unexpended balances does not appear, but that the contrary intention affirmatively appears.

The facts concerning the appropriations for the other normal schools are of the same nature as those herein set forth concerning the appropriations for the Whitewater school, and the same conclusions are reached.

By the Court.—The motion to quash the alternative writ is denied, and it is adjudged that the peremptory writ of *mandamus* issue as prayed in the complaint. No costs are awarded.

STETZ, by guardian *ad litem*, Appellant, vs. F. MAYER BOOT & SHOE COMPANY, Respondent.

February 24—May 2, 1916.

Workmen's compensation: What minors are "employees:" Employment in violation of law: Injury: Liability of master: Misrepresentation as to age: Counterclaim: Estoppel: Settlement and release: Guardian and ward.

1. A minor under sixteen years of age who, at the time of his employment and injury, had not obtained a written permit authorizing his employment as required by sub. 1, sec. 1728*a*, Stats., was not "legally permitted to work under the laws of the state" within the meaning of sub. (2), sec. 2394—7, Stats., and hence was not an "employee," within the meaning of the latter section, whose rights in respect to such injury were governed by the Workmen's Compensation Act. *Foth v. Macomber & W. R. Co.* 161 Wis. 549, distinguished and limited.
2. One who, in violation of sub. 1, sec. 1728*a*, Stats., employs a minor under the age of sixteen years without the written permit therein provided for, and is thus guilty of a misdemeanor under sec. 1728*h*, is liable for injuries sustained by the minor as a result of such unlawful employment, and the facts that the minor and his father misrepresented his age in order to secure such employment and that the employer was justified, in the exercise of proper vigilance, in relying upon their representations that the boy was more than sixteen years of age, do not constitute a defense in the action by the minor to recover for such injuries.
3. Nor do the facts above stated form a basis for a counterclaim by the employer against the minor for damages on account of such misrepresentation.
4. The statute (sec. 1728*a*, Stats.) being declaratory of a public policy, and the act of the employer only, not that of the minor, being made unlawful, the fact that the minor misrepresented his age does not bar or estop him from recovering damages for his injury.
5. A settlement agreed upon for injuries to a minor employee and a release signed by his guardian under the mistaken supposition that the claim was governed by the Workmen's Compensation Act, did not settle the claim for damages for his injuries resulting from his employment in violation of sec. 1728*a*, Stats., there being manifestly no such intention; and in any event the release, not having been approved by the county judge as required by sec. 3982, Stats., is not binding upon the minor as to such claim for damages.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Reversed.*

This is an action to recover damages resulting from personal injuries sustained by the plaintiff while in the employ of the defendant company.

The defendant is a corporation engaged in the manufacture of boots and shoes in the city of Milwaukee. The plaintiff was employed by the defendant, and while operating a heel-press machine he was injured. At the time the plaintiff was injured he was less than sixteen years of age and had no permit authorizing his employment. The plaintiff went with his father and uncle to the home of the foreman of the defendant company to apply for work. They represented to defendant's foreman that plaintiff was then sixteen years of age. Sometime after plaintiff was injured he went to the liability insurance company which carried insurance for the defendant, and a settlement of $287.84 was agreed upon as the maximum allowed under the Workmen's Compensation Law. Plaintiff's guardian signed a release for this amount. This settlement was approved by the industrial commission, but was not approved by the county court of Milwaukee county. The court submitted a special verdict to the jury, who found (1) that the plaintiff was less than sixteen years of age at the time he was employed by the defendant; (2) that the plaintiff represented to the defendant's foreman at the time he was employed that he was more than sixteen years of age; (3) that the plaintiff's father, at or prior to plaintiff's employment, represented to the defendant's foreman that plaintiff was more than sixteen years of age; (4) that the foreman was justified in the exercise of proper vigilance, in the light of plaintiff's appearance, in relying upon the representations that the plaintiff was more than sixteen years of age; (5) that there were no false and fraudulent representations knowingly made by any one, on behalf of the defendant or the insurance company, to the plaintiff or his father as an inducement to the

signing of the release of plaintiff's claim; (8) that there was not gross negligence on plaintiff's part which contributed to his injury; (9) that if plaintiff is entitled to recover his damages are $985.

The court awarded judgment on this verdict dismissing plaintiff's complaint with costs. From such judgment this appeal is taken.

For the appellant there was a brief by *Rubin, Fawcett & Dutcher,* attorneys, and *P. R. Newcomb,* of counsel, and oral argument by *Mr. Newcomb.*

For the respondent there was a brief by *Doe, Ballhorn, Wilkie & Doe,* and oral argument by *J. B. Doe.*

The following opinion was filed March 14, 1916:

SIEBECKER, J. Are the rights of the parties to this action governed by the provisions of the Workmen's Compensation Law, secs. 2394—1 to 2394—31, Stats. 1915, inclusive? By sub. (2) of sec. 2394—7 of this act the term "employee" as used in the Workmen's Compensation Law shall include "Every person in the service of another under any contract of hire, express or implied, oral or written, including aliens, and also including minors who are legally permitted to work under the laws of the state (who, for the purposes of section 2394—8, shall be considered the same and shall have the power of contracting as adult employees)." The plaintiff was less than sixteen years of age at the time of his employment and injury. He had not obtained "a written permit authorizing the employment" of him, under sub. 1, sec. 1728*a*, which forbids the employment of children "between the ages of fourteen and sixteen years . . . in any factory or workshop, . . . or at any gainful occupation, or employment, directly or indirectly, unless there is first obtained from the commissioner of labor . . ." or other specified officers "a written permit authorizing the employment of such child within such time or times as the said commissioner of

labor . . ." or other officers "may fix; . . ." If the plaintiff's legal remedy for the injury he suffered is governed by the Workmen's Compensation Law, then the defendant has discharged its obligations toward him by the settlement made with him under this law, which received the formal approval of the industrial commission.

The plaintiff, being under sixteen years of age at the time of employment and not having obtained a written permit authorizing his employment as provided by sub. 1, sec. 1728*a*, could not be legally employed by defendant for the service at which he was engaged and in which he suffered his injuries. The terms of sub. (2), sec. 2394—7, which confers on minors the power to contract for employment the same as adults, clearly limit the power so conferred to minors "who are legally permitted to work under the laws of the state." It seems plain that the statute includes only such minors who at the time of contracting are legally authorized to enter the employer's service. The legislative intent evidently is to enable any minor who has the legal right to work to make a contract for his employment the same as adults, and if he has the legal authority to exercise this right then he "shall be considered the same . . . as adult employees" for the purposes of sec. 2394—8 of the Workmen's Compensation Law. The provisions of this statute can only apply to minors who are at the time of contracting to enter the service of another authorized and permitted under the law to engage in such service and employment the same as adults.

It is urged that the Workmen's Compensation Law applies to and includes all minors in the service of others, who, under the law, may upon specified conditions and circumstances obtain a permit authorizing their employment, without first obtaining the permit provided by law. This contention runs counter to the terms of the Compensation Law and the provisions of other statutes prohibiting the employment of children under certain ages. The interpretation of sub. (2), sec.

2394—7, as applied in *Foth v. Macomber & W. R. Co.* 161 Wis. 549, 154 N. W. 369, does not include the instant case. In that case the minor who was injured was at the time of entering the services legally authorized to engage in the occupation for which he contracted to work, but at the time of injury he was working at a machine at which he was forbidden to work, and it was held that, since the minor was legally authorized to make that contract of employment, for the purposes of sec. 2394—8 he must be considered the same as an adult employee, and that under the facts and circumstances shown he was injured while "performing service growing out of and incidental to his employment." The language of the court in the decision of the *Foth Case* must be understood and interpreted in the light of the facts of that case. When so read and properly restricted in its application, the phraseology employed in construing the statutes therein referred to does not conflict with the interpretation of the law in its application to this case. From the foregoing it necessarily results that the provisions of the Workmen's Compensation Law do not govern the rights of the parties to this case.

The question then arises whether or not the defendant is liable in damages to the plaintiff under the law applicable to persons having the relation which is shown to have existed between plaintiff and defendant when the accident happened. The provisions of sub. 1, sec. 1728*a*, prohibit the employment of any child between the ages of fourteen and sixteen years to work in any factory or workshop, etc., without first obtaining a written permit as therein specified. Sec. 1728*h* declares that any employer, including a corporation, violating the provisions of sec. 1728*a* shall be deemed guilty of a misdemeanor and liable to fine or imprisonment. It is without dispute that defendant's employment of plaintiff, under the facts found by the jury, was a violation of these statutes and makes the defendant liable in damages to plaintiff, unless the finding of the jury to the effect that defendant's foreman was reason-

ably justified, under all the facts and circumstances, in relying on plaintiff's representation that he was more than sixteen years of age, bars the plaintiff's right to a recovery of his damages. In *Pinoza v. Northern C. Co.* 152 Wis. 473, 140 N. W. 84, it was held that in an action for injuries to a boy under sixteen years of age which resulted from his employment by the defendant in that case in violation of sec. 1728*a*, Stats. 1911 (ch. 338, Laws 1909), in an "employment dangerous to life and limb," the defense of contributory negligence is not available, and that such a violation of the statute, constituting a criminal offense, is classed with gross negligence as defined in our law and makes the person liable in a civil action for the injuries resulting from such violation of the law. The basis of that decision rests essentially, as there declared, on these propositions:

"If a person purposely does an act in violation of a duty created by law as regards the personal safety of others, and the policy of the written law is that the prevention of such violations is so important that a person guilty thereof should in addition to civil liability to the injured person be held criminally liable as for a serious offense against the public, the act should be regarded as done regardless of human life or bodily injury . . . ; thus classing the act of the wrongdoer with ordinary acts of gross negligence. . . . The principle thus stated is in harmony with general public policy. Every one is presumed to know the law, even though as a matter of fact he may be ignorant of it."

Lenahan v. Pittston C. M. Co. 218 Pa. St. 311, 67 Atl. 642; *Stehle v. Jaeger A. M. Co.* 220 Pa. St. 617, 69 Atl. 1116; *Strafford v. Republic I. & S. Co.* 238 Ill. 371, 87 N. E. 358.

Upon the facts of this case the defendant, under the doctrine as applied in the *Pinoza Case,* is liable to plaintiff for the injuries he sustained as a result of such unlawful employment of him by the defendant unless plaintiff's misrepresentation of his age to defendant's foreman, as found by

the jury, operates as a bar to plaintiff's right to recover damages for his injuries. As has been indicated in the decisions of this court, the liability in this class of cases is predicated on the tort arising from the act which the law denounces as a crime as distinguished from liability arising from acts of ordinary negligence. In those cases it is said of the act of the employer in employing a minor in violation of the law, which results in injury to the minor, "The fault was advertent in character. There was an actual or constructive intent to violate the law, equivalent, as indicated, to a constructive intent to cause the consequences which the law was designed to prevent." Under the law as here established the record now before us presents no case within the law of negligence, and all precedents in other jurisdictions, of which *Koester v. Rochester C. Works,* 194 N. Y. 92, 87 N. E. 77, is representative, have no application to this case because it and others similar in their character go on the grounds of negligence.

The inquiry then arises, Is plaintiff estopped from recovering his damages in this case by misrepresenting his age to defendant's foreman at the time he was employed? The object of the provisions of sec. 1728*a,* Stats., is to conserve the health and morals of children in the interest of the general welfare. It is declaratory of a public policy and makes all employments of children contrary to its provisions criminal acts, and we do not deem it permissible for the court to so construe the statute and restrict its operative effect that it would not harmonize with this clear legislative intent. To permit an employer to protect himself against the consequences resulting from his violation of this law by the plea that he acted with reasonable diligence to avoid a breach of it, would seriously restrict and modify the beneficial objects for the protection of children which the legislature obviously intended to accomplish. The *Pinoza Case* points out the fact that the statute is undoubtedly taken from a similar one

in the state of Illinois and was there construed, before this state enacted it, in *American C. & F. Co. v. Armentraut,* 214 Ill. 509, 73 N. E. 766. In that case the injured child had misrepresented his age, and it was urged that such misrepresentation was a bar to his recovery in an action for injuries resulting from the illegal employment. The court held: "This doctrine is not applicable for the reason that the statute under consideration is aimed at the master and not at the servant. The act of the child in accepting or entering into the employment is not unlawful." In the case of *Inland S. Co. v. Yedinak,* 172 Ind. 423, 87 N. E. 229, where a minor brought action for injuries he suffered from a violation of a statute of this class, the court, after a thorough review of the grounds upon which the policy of such statutes rests, holds that a minor is not barred or estopped from recovering damages for such injuries by his misrepresenting his age. This rule was also enforced in the following cases wherein this question was presented for decision: *DeSoto C. M. & D. Co. v. Hill,* 179 Ala. 186, 60 South. 583; *Syneszewski v. Schmidt,* 153 Mich. 438, 116 N. W. 1107; *Kirkham v. Wheeler-Osgood Co.* 39 Wash. 415, 81 Pac. 869; *Matlock v. W., G. & St. L. R. Co.* 198 Mo. 495, 95 S. W. 849. In *Eliot v. Eliot,* 81 Wis. 295, 51 N. W. 81, the question whether an infant who is incapable of entering into a marriage contract for want of age is estopped by a fraudulent declaration of his age, which induced a marriage with him, was negatived upon the ground that an infant who is legally incapacitated to make a valid contract of marriage is incapable also to estop himself by such fraudulent representation. The case of *Grauman, M. & C. Co. v. Krienitz,* 142 Wis. 556, 126 N. W. 50, holds that a minor may by his own fraud estop himself from assailing a contract on the ground of infancy, but it is declared that the rule rests upon certain conditions, and that: "It is confined to cases where the infant, though under legal discretion, is in fact developed to the condition of actual discretion. It is further confined to cases of actual fraud and

where the contract or transaction is beneficial to the minor." The doctrine as applied to minors is there held to be closely fenced about: "(1st) By necessity for actual discretion; (2d) necessity for actual fraud; (3) necessity for beneficial nature of the transaction to the minor." An attempt to class the instant case as within the foregoing rules would necessarily fail because the employment of the plaintiff in violation of the law is obviously not a transaction which can in any light be considered beneficial to the minor. It necessarily follows from what has been said on the foregoing questions that defendant's contention respecting its rights to enforce a counterclaim for damages resulting from the minor's fraudulent misrepresentation of his age must fail. As indicated, these misrepresentations of the plaintiff afford no legal ground on which defendant can predicate a claim against the minor.

The release given by plaintiff's guardian was based on the ground that the plaintiff's claim against defendant was regulated and controlled by the provisions of the Workmen's Compensation Law. Manifestly there was no intent to settle the plaintiff's claim against defendant under the law for damages for his injuries resulting from his wrongful employment in violation of the law. Furthermore, if it is claimed that the release included this claim for damages, it is not binding on plaintiff because it was not approved by the county court as is required by sec. 3982, Stats. The guardian's power is limited by the law, and his acts which the law does not sanction are not binding on his ward.

By the Court.—The judgment appealed from is reversed, and the cause remanded to the circuit court with direction to award judgment in plaintiff's favor for the recovery of the damages found by the jury.

VINJE, J., dissents.

A motion for a rehearing and for a modification of the mandate was denied, with $25 costs, on May 2, 1916.

HICKMAN, Appellant, vs. WELLAUER and others, Respondents.

April 11—May 2, 1916.

Municipal corporations: Ordinances: Construction: Validity: Regulation of buildings: Location of stables: Excessive penalties.

1. In sub. (a), sec. 474, art. 39, ch. IV, Milwaukee Code of 1914,—providing that all buildings within the business section "may be occupied or maintained for any purpose whatsoever (if in conformity with all ordinances governing the construction of such buildings),"—the word "construction" relates to the materials which compose such buildings and does not refer in any way to their location.
2. Sec. 338, art. 27, ch. IV, Milwaukee Code of 1914,—prohibiting the construction of stables within fifteen feet of any residence, dwelling, or place of assemblage,—is limited by sub. (a), sec. 474, above mentioned, and does not apply to the business section. [Whether sec. 338 is valid as applied to the residence district or the territory outside of the business section, not determined.]

[3. Under sec. 543, art. 46, ch. IV, Milwaukee Code of 1914, any violation of ch. IV is punishable by a fine of not less than $10 nor more than $200, and it is provided that each day of continued violation shall constitute a separate offense, but that the accumulated penalties recoverable in any one action shall not exceed $2,000. Whether such clause relating to penalties for continuing offenses is void on the ground that the accumulative penalty is excessive, and whether, if void, it is separable from the remainder of the section, not decided.]

APPEAL from an order of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

Action to restrain defendant *Wellauer* from erecting a stable within the business section of the city of Milwaukee. The facts are these: Plaintiff owns a lot upon which is situated a three-story brick building used as a hotel and restaurant. The defendant *Wellauer* owns the premises adjoining. In September, 1915, *Hartman,* a contractor under *Wellauer,* commenced excavating on *Wellauer's* premises preparatory to erecting a building thereon. The excavation resulted in

disturbing the lateral support of plaintiff's premises. Plaintiff brought an action to restrain further excavation. *Wellauer* denied the claims of the plaintiff, and upon a hearing on an order requiring the defendants to show cause why a temporary injunction should not be continued the defendant *Wellauer* gave an indemnifying bond in the sum of $20,000 and the injunction was dissolved. The plaintiff thereafter and, as he claims, for the first time learned that the building was being erected as a stable under a building permit issued by the defendant *Harper* as inspector of buildings for the city of Milwaukee, and brought this action against *Wellauer* as owner, *Hartman* as contractor, and *Harper* as inspector to compel the defendants *Wellauer* and *Hartman* to surrender the permit issued for the erection of the building and to compel *Harper* as building inspector to revoke the permit issued by him. Plaintiff moved for a temporary injunction, and from the order denying this motion he brings this appeal.

Chas. E. Canright, attorney, and *Herbert J. Piper,* of counsel, for the appellant.

For the respondents *Wellauer* and *Hartman* there was a brief by *Hoyt & Goff,* and oral argument by *Guy D. Goff.*

For the respondent *Harper* as inspector of buildings there was a brief by *Daniel W. Hoan,* city attorney, and *Charles W. Babcock,* assistant city attorney, and oral argument by *Mr. Babcock.*

ROSENBERRY, J. Plaintiff claims that the permit was issued contrary to the provisions of ch. IV of the Milwaukee Code of 1914 relating to buildings. Ch. IV is entitled "Buildings" and is divided into thirty-nine articles, composed of secs. 27 to 543, both inclusive.

Art. 27 is entitled "Stables and structures for animals." Sec. 338 reads as follows:

"No person, firm or corporation shall construct or establish any stable or structure, to be used for the keeping or

housing of domestic animals, at a less distance than fifteen feet from any residence, dwelling or place of assemblage.

"The floor of all stables or rooms used for such purposes shall be made of material impervious to water and shall be drained by connecting with the city sewer."

Other articles are headed "Sheds," "Garages," "Tenement houses," "Theaters and public halls," "Dry cleaning establishments," etc. Following this is art. 39, entitled "Business section and fire district," of which the following is a part:

"Business section; fire district.

"Section 472. All that part of the city of Milwaukee embraced within the following limits shall hereafter be known as the business section and fire district.

"Slaughter houses, rendering plants and rag shops not permitted in city limits.

"Section 473. Slaughter houses, rendering plants and rag shops shall not be permitted to be erected or maintained within the limits of the city of Milwaukee.

"Building restrictions in business section.

"Section 474. The term 'business section' as used herein shall mean;

"(a) That all buildings within this section or portion of the city being within the described boundaries may be occupied or maintained for any purpose whatsoever (if in conformity with all ordinances governing the construction of such building).

"(c) Nothing herein contained shall prohibit the erection of residences within this business section, providing the erection of such residences conforms to the requirements for building within the fire district.

"(d) Livery, boarding or sales stables, gas houses, gas reservoirs or holders, paint, oil or varnish works, salesroom or storage room for automobiles or garages for the keeping of automobiles for hire may be built within that portion of the city not set aside for business purposes, providing that the person, firm or corporation desiring to build, remodel or maintain such building for the purpose of a livery, boarding or sales stable, gas house, gas reservoir or holder, paint, oil or varnish works, salesroom or storage room for automobiles or garage for the keeping of automobiles for hire shall first

obtain the written consent of two thirds of all real-estate owners within three hundred feet of the space occupied by the business proposed to be maintained.

. . . . . .

"(f) Nothing herein contained shall prohibit the erection or occupancy of a building used for business purposes outside of the within described section excepting as heretofore mentioned.

"(g) Any building erected, constructed, remodeled or maintained within the city limits as livery, boarding or sales stables, gas house, gas reservoir or holder, paint, oil or varnish works, salesroom or storage room for automobiles, or garage for the keeping of automobiles for hire must be constructed, erected or remodeled the same as a building within the fire district."

It is admitted that the place in question is within the business district.

Appellant contends that the erection of the building in question is forbidden by sec. 338 set out above. Respondents contend that sec. 338 is limited by sub. (a) of sec. 474 as set out above, and therefore that sec. 338 does not apply to the business section.

Whether the contention of respondents is correct or not depends upon the meaning of the word "construction" as used in sub. (a) of sec. 474. The city officials of the city of Milwaukee have construed the ordinance in accordance with the contention of the respondents, and after a careful examination of the ordinance we are of the opinion that the meaning given to the word "construction" by the city officials of Milwaukee is correct. Among other things which indicate this is the effect given to the word in sec. 475.

"Section 475. The term 'fire district' as used herein shall mean—

"That buildings hereafter erected or remodeled within the fire district herein described shall be erected or *constructed* as follows, when in conformity with the provisions of the city ordinances:"

Then follow five subdivisions, all relating to the material

of which the building shall be made, and none relating to its location with reference to streets or other buildings.

In art. 2 of ch. IV, entitled "Terms in building ordinances defined," the terms "fireproof construction," "mill construction," and "ordinary construction" are defined, and in each instance the definition relates wholly to the materials which compose buildings of certain classes, and in none of them is the word "construction" used as referring in any way to location. While in ordinary conversation the verb "to construct" may be and sometimes is used to refer to location, as that a building is not constructed in accordance with the provisions of law, meaning that it is not located as required by law, nevertheless we are of the opinion that, as used in sec. 474, "construction" should be given the same meaning it has in other parts of the ordinance, and especially so as this is its true meaning. It is defined as follows: "The process or art of construction; the act of building; the act of devising and forming; fabrication; composition." Webster.

If it was intended that sec. 338 should apply to that part of the city embraced in the business district, that part of the ordinance providing for the erection of livery, boarding, and sales stables in that portion of the city not included in the business district would be inconsistent, in that it would permit the erection of the more objectionable classes of stables in the residence district and would entirely prohibit their erection in the business district. We therefore hold that sec. 338 does not apply to buildings for stables in the business section.

Whether or not sec. 338 is valid as applied to the residence district or the territory outside of the business section is not argued or presented here and is not determined.

The section providing a penalty for violation of ch. IV is as follows:

"Section 543. Any person, firm, company or corporation owning, controlling or managing any building or premises wherein or whereon there shall be placed or there exists any-

thing in violation of any of the sections of this chapter; or any person, firm, company or corporation who shall assist in the commission of any violation of these sections; or who shall build contrary to the plans or specifications submitted to and approved by the building inspector; or any person, firm, company or corporation who shall omit, neglect or refuse to do any act required in said sections shall, except where a special penalty is provided, be subject to a fine of not less than ten dollars nor more than two hundred dollars, together with the costs of the action, and in default of payment thereof, to imprisonment in the house of correction for a period of not less than one day nor more than six months, or until such fine and costs shall be paid; *and every such person, firm, company or corporation shall be deemed guilty of a separate offense for each day such violation, disobedience, omission, neglect or refusal shall continue; provided, however, that said accumulated penalties recoverable in any one action shall not exceed the sum of two thousand dollars.*"

We are asked to declare the ordinance void on the ground that the penalty is excessive under the rule laid down in the case of *Bonnett v. Vallier,* 136 Wis. 193, 116 N. W. 885. The part particularly objected to is here printed in italics. This we decline to do for two reasons: (1) No penalties are sought to be recovered in this case. (2) The clause relating to penalties for continuing offenses, even if the penalty should be held excessive, may be separable from the remainder of the section, questions which we suggest but do not decide, as they are not before us. *U. S. ex rel. Att'y Gen. v. Delaware & H. Co.* 213 U. S. 366, 417, 29 Sup. Ct. 527; *Grenada L. Co. v. Mississippi,* 217 U. S. 433, 443, 30 Sup. Ct. 535. The order of the trial court is therefore correct.

By the Court.—Order affirmed.

HUEBNER, Respondent, vs. HUEBNER, Appellant.

April 11—May 2, 1916.

Contracts: Validity: Statute of frauds: Consideration: Damages for breach: Loss of future profits.

1. An oral agreement on the one side to render personal services and on the other to pay for such services in a certain way is not void for lack of consideration, even though no money be paid at the time, each promise being the consideration for the other.
2. The fact that an oral agreement was originally made more than a year before it was to be performed does not render it void under sec. 2307, Stats., if it was reiterated within such year.
3. Past profits of an established business are a legitimate basis for estimating the future profits of the same business conducted in the same manner; and in a proper case such future profits may be recovered when the plaintiff has been prevented from making them by the wrongful conduct of the defendant.

APPEAL from a judgment of the circuit court for Milwaukee county: OREN T. WILLIAMS, Circuit Judge. *Affirmed.*

Action for breach of contract. The plaintiff is the widow of the defendant's crippled son, Ben Huebner. The defendant owned a building at 1532 Vliet street, Milwaukee, and operated a saloon therein for some time prior to May 1, 1912, on which date he sold the business, stock, and fixtures to Ben for $2,260, of which $1,000 was paid down, Ben agreeing to pay $45 per month rent for the premises and to pay the balance of the purchase price as he could. July 1, 1912, Ben took out a saloon license in his own name and conducted the business until his death March 16, 1913. The plaintiff took charge of the business with the defendant's consent and assistance after her husband's death. On July 1, 1913, the defendant with plaintiff's consent took out the license for the ensuing year in his own name, and at about this time an oral arrangement was made between plaintiff and defendant as to the future conduct of the business, the terms of which are in dispute. The plaintiff claims that the agreement made about

the 29th of May and reiterated on July 1st was in substance that defendant was to take out the license in his own name and that the plaintiff was to operate the business for him and receive the profits after paying the rent and keeping up the stock, she to pay the balance on the purchase price of the stock and fixtures as she could, and at the end of the license year the defendant to pay back the $2,260 and resume his proprietorship of the stock and business. The defendant claims in effect that he took possession after his son's death and that plaintiff operated the saloon with his assistance thereafter simply as his employee under the arrangement that she was to have the net profits of the business for her work. The evidence tends to show that further payments were made on the original contract of purchase out of the receipts of the business after Ben's death, but the amounts are in dispute. The plaintiff claims that it was entirely paid. Differences arose between the parties as to the management of the business and in February, 1914, the defendant took down the license, closed the place, and deeded the same to his brother. Plaintiff occupied the premises as a residence until April 1st, when she moved out and stored the stock and fixtures. In this action she claims to recover the $2,260 paid for the stock and fixtures as well as damages for breach of the alleged contract by which she was to conduct the business for a year and receive the net profits. The jury returned a special verdict as follows:

"(1) Did the defendant and his son, Bernhard Huebner, Jr., enter into a contract for the sale of the stock and saloon fixtures at 1532 Vliet street, and the whisky in bond, on or about May 1, 1912, in substance as stated in the receipt marked 'Exhibit 3' in this case and signed by *Bernhard Huebner, Sr.?* *A.* (by the court by consent of counsel). Yes.

"(2) On May 1, 1912, did Bernhard Huebner, Jr., pay to his father upon said agreement the sum of $1,000? *A.* (by the court by consent of counsel). Yes.

"(3) Upon the decease of Bernard Huebner, Jr., did the plaintiff take possession of the saloon, stock, and fixtures and

continue to operate the saloon under the agreement contained in 'Exhibit 3'? *A.* Yes.

"(4) By means of and through conversations had between the plaintiff and defendant on and between March 16 and July 7, 1913, did the plaintiff, *Hannah Huebner,* and the defendant agree that the plaintiff should be employed to operate the saloon at said place under said contract of May 1, 1912, for a period of one year under the defendant's license, and that in consideration she should receive the net profits derived from said business? *A.* Yes.

"(5) If you answer the fourth question 'Yes,' you need not answer this question; otherwise answer this question: Did the plaintiff and defendant on, at, or between any of the dates mentioned in the preceding question, enter into an agreement that the plaintiff should be employed to operate the saloon under the agreement of May 1, 1912, from month to month, under the defendant's license? *A.* ——.

"(6) Did the plaintiff and defendant enter into an agreement on or about the 29th day of May, 1913, whereby the defendant agreed to pay to the plaintiff July 1, 1914, the sum of $2,260 as a refund of moneys paid upon the stock and fixtures? *A.* Yes.

"(7) What amount, if any, was paid by Bernhard Huebner, Jr., upon said contract after May 1, 1912, to apply thereon? *A.* $460.

"(8) What is the total amount of payments, if any, which were made by the plaintiff to the defendant to apply upon the balance owing on said stock and fixtures under the contract of May 1, 1912, up to the time when she moved the stock and fixtures out of the saloon? *A.* $751.

"(9) Who was the owner of said stock of merchandise and fixtures when they were removed from the saloon by the plaintiff? *A. Bernhard Huebner, Sr.*

"(10) Did the defendant, *Bernhard Huebner,* at any time after the death of Bernhard Huebner, Jr., agree to credit the plaintiff with the whole purchase price of $2,260 when the same should have been paid, and to take back the said replenished stock and fixtures? *A.* Yes.

"(11) What amount, if any, is still owing from the plaintiff to the defendant on that stock of merchandise and on the fixtures removed by the plaintiff from the saloon on March 31 and April 1, 1914? *A.* $39.

"(12) Was the defendant justified, under the existing circumstances and conditions, in removing the license from said saloon and thereby preventing the plaintiff from continuing to operate said saloon under the defendant's license? *A.* No.

"(13) If you answer the foregoing question 'Yes,' you need not answer this question; otherwise answer this question: What damage, by reason of loss of profits, did the plaintiff sustain by reason of the defendant's conduct in removing the license and forbidding her to operate longer thereunder? *A.* $1,085.

"(14) The defendant paid for the city license, United States license, and pool-table license the sum of $240. How much, if any, of this did the plaintiff repay? *A.* $240.

"(15) What sum, if any, do you find the defendant indebted to the plaintiff for lunches, bar, and cigar account from July 7, 1913, to February 16, 1914? *A.* Nothing.

"(16) If the court should be of the opinion that the plaintiff is entitled to recover, at what sum do you assess the plaintiff's damages in this action? *A.* $3,345."

The trial judge, upon motion for a new trial, changed the answer to the eleventh question from $39 to $49 and ordered a new trial unless the plaintiff elected to reduce the damages found in the answer to the thirteenth question from $1,085 to $500 and take judgment for $2,870 instead of $3,345. The plaintiff accepted the reduction and judgment was ordered for the plaintiff for $2,870 on April 15, 1915. In May following the defendant made a second motion for new trial based on affidavits showing newly discovered evidence. This motion was overruled and judgment entered as previously ordered, from which the defendant appeals.

Adolph G. Schwefel, for the appellant.

For the respondent there was a brief by *Curtis & Mock,* and oral argument by *H. K. Curtis.*

WINSLOW, C. J. But two contentions are argued in the appellant's brief, namely, (1) that the agreement claimed by the plaintiff to have been made between the defendant and herself was void because without consideration, and (2) that

no damages could properly be allowed for loss of profits of the business. Neither contention can be sustained.

1. The agreement testified to by the plaintiff, though somewhat remarkable in its terms, is not incredible, and was in effect an agreement to render personal services on the one side and to make payment for them in a certain way on the other. In such agreements there is no lack of consideration, even though no money be paid at the time. It is a case of a promise for a promise; each is the consideration for the other. *Olson v. Olson,* 149 Wis. 248, 135 N. W. 836. If this contract had been made on May 29th alone, it might perhaps be objected that it was not to be performed within a year and hence void under the statute of frauds because not in writing. Sec. 2307, Stats. 1913. Plaintiff testified, however, that the same agreement was reiterated July 1, 1913, and, while the jury were not asked whether the contract was reiterated on that date, it must be presumed in support of the judgment that the court so found, no request having been made by the appellant to submit to the jury a question covering this point. Sec. 2858*m,* Stats. 1913.

2. The rule is well established in this court that past profits of an established business constitute a legitimate basis upon which to estimate the future profits of the same business conducted in the same manner, and that in a proper case such future profits may be recovered when the plaintiff has been prevented from making them by the wrongful conduct of the defendant. *Gross v. Heckert,* 120 Wis. 314, 97 N. W. 952; *Forster, Waterbury Co. v. F. MacKinnon M. Co.* 130 Wis. 281, 110 N. W. 226.

No other contentions are made which it is deemed necessary to discuss.

By the Court.—Judgment affirmed.

HIECKE, Respondent, vs. HIECKE, Appellant.

April 11—May 2, 1916.

Divorce: Recrimination: Cruel and inhuman treatment: Findings: Sufficiency: Division of property: Costs.

1. **Misconduct of the plaintiff, if not in itself a ground for divorce, will not preclude the granting of a divorce on the ground of the defendant's misconduct, but may properly be considered on the question whether it so far provoked defendant's misconduct (in this case his alleged cruel and inhuman treatment of the plaintiff) that a divorce should not be granted on that ground.**
2. **A divorce may be granted on the ground of cruel and inhuman treatment even though no actual impairment of the plaintiff's health was caused by defendant's conduct, if that conduct was such as naturally to cause great mental suffering to the plaintiff and render impairment of health probable, so that further efforts to perform conjugal duties would be dangerous.**
3. **In the absence of a specific finding of fact that the long continued ill-treatment of the plaintiff wife by defendant (as to which the court made detailed findings) imperiled her health, made the marriage state intolerable, and rendered her incapable of performing the duties of a wife, a conclusion of law that she was entitled to a judgment of divorce may be treated as inferentially finding those facts; but a specific finding on the subject would be much more satisfactory.**
4. **Allowance, in the taxation of costs in a divorce action, of $25 as expenses incurred by a court commissioner, before whom the defendant was examined, in listing and numbering checks, is *held* not to have been improper.**
5. **The division of property in this case is sustained, it not clearly appearing to be a departure from the general rule that a liberal allowance to the divorced wife is one third in money value of the husband's property, which may be increased to one half or more for special circumstances.**

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

Action for a divorce on the ground of cruel and inhuman treatment.

Defendant answered, denying all allegations upon which the claim of cruel and inhuman treatment was based, and

pleading misconduct of plaintiff, palliating, if not justifying, any improper treatment of her.

As the trial court viewed the evidence it established the following situation:

(1) The parties intermarried at the city of Milwaukee, Wisconsin, May 25, 1898. (2) Since that time they have resided there. (3) They have four children, a son fifteen years old, a daughter twelve years old, a daughter ten years old, and a daughter seven years old,—all of whom have resided with plaintiff since June 29, 1914. (4) On many occasions defendant slighted plaintiff and did not speak to her, causing her much mental anguish. Upon her kindly protesting against such treatment, she was told by defendant that it was none of her business and if she did not like it she could go. In July, 1898, she was compelled to leave defendant and to reside with her parents. Following their advice and that of her brother, she returned, but defendant refused to speak to or forgive her. (5) On each occasion of the birth of a child, defendant neglected plaintiff by purposely remaining away from home. On one such occasion, though he was only four blocks away and knew that she was alone and in need of her nurse and physician, he refused to answer her urgent call for his presence. (6) He has been accustomed, for days, weeks, and months at a time, to refuse to speak to her. (7) June 25, 1914, he was out till 2:30 the following morning; then returned home intoxicated, took a valuable new blanket she had purchased, made it into a ball and threw it at her, stating that it was a cheap lodging-house blanket; at the same time, in the presence of the oldest son and a servant, using very vile and abusive language toward her, and he was accustomed to do that. (8) About six years prior to the commencement of the action, he returned home under the influence of liquor and, with his clothing offensive from tobacco and cigarette smoke, entered plaintiff's apartments, whereupon she spoke to him as to his condition and he left the room, since which time they have not cohabited as man and

wife. (9) On social occasions he customarily neglected her. (10) Usually she and the children have spent the summer months at her mother's at Cedar Lake, Wisconsin, defendant, as a rule, visiting her Saturday nights and remaining until Sunday night; but spending very little time with the family. He would, customarily, go fishing and then to a neighboring hotel and stay most all night drinking. In 1913 and 1914 he did not visit plaintiff and the family at all during their sojourn with her mother of some three months each season. (11) On Christmas, 1912, he refused to accept a Christmas present from her, or to dine with her and the family. He spent the day with his sister and there distributed presents to his children. (12) She possesses improved, income-yielding real estate for which she paid $5,800. On account of necessary outlays for repairs, the net income therefrom has been less than two per cent. (13) She has household furniture in her possession worth about $500 which was a gift from her parents. (14) He is a strong man of fair business capacity, a pharmacist by occupation, and has conducted a drug store, under an arrangement with his father, for years. The assets of the business are worth $9,000 and he has some contingent interest therein. (15) He owns one third of the $60,000 par value of the stock of the Turbine Sewer Machine Renovating Company, the value of which is nominal. The stock has not all been paid for. (16) He owns a city lot worth $100. (17) He owns a policy of life insurance on which he has paid, as the annual premium, $100 per year for fourteen years. (18) For six years he has given her $30 per week for household expenses, paid $20 per month for rent of the home, and paid about $15 per month for fuel bills, besides clothing the children. (19) She is a suitable person to have the custody of the children and it is for their interests that she should have such custody.

On such facts the court concluded as follows: Plaintiff is entitled to judgment of absolute divorce on the ground of cruel and inhuman treatment, and to be awarded custody of

the children. The policy of insurance should be assigned to her, defendant to pay the annual premium until maturity. He should pay her $400 in six months, the same in twelve months, and the same in eighteen months. He should be divested of all interest in the household furniture. He should pay her attorneys $100 for attorneys' fees and pay the taxable disbursements of the action. He should pay, until further order of the court, $80 on the first day of each month for the support of the minor children. He should have the corporate stock mentioned, and the contingent interest in the drugstore assets. Such distribution shall be a final division of property subject thereto.

Judgment was entered according to such conclusions except the provision for support of the children was made payable in weekly instalments.

There was a retaxation of costs as to $120 claimed by a court commissioner for service in the action for expenses incurred in listing and numbering checks. That was reduced to $25.

Adolph G. Schwefel, for the appellant.

For the respondent there was a brief by *Lorenz & Lorenz,* and oral argument by *Le Roy B. Lorenz.*

MARSHALL, J. It is considered that,—in the light of the rules governing the matter, particularly, that the findings are to be presumed correct unless against the clear preponderance of the evidence, giving due weight to the fact that the trial judge saw the witnesses and had a far better opportunity than is afforded by reading the printed history of the trial for weighing their testimony,—the conclusions of fact here cannot properly be disturbed.

It is contended that, though the facts found stand as verities, the divorce should not have been granted because of proof that the respondent was guilty of much matrimonial misconduct. That misconduct of one party to a marriage con-

tract would justify or require, under some circumstances, denial of judicial assistance to such party to nullify such contract, is well established by the decisions of this court. That rule, so far as it relates to an absolute bar to a guilty party successfully prosecuting an action for a divorce, is limited, in general, to cases where both parties have been guilty of a legal cause therefor (*Pease v. Pease,* 72 Wis. 136, 39 N. W. 133; *Hubbard v. Hubbard,* 74 Wis. 650, 43 N. W. 655; *Voss v. Voss,* 157 Wis. 430, 147 N. W. 634); though it has been sometimes extended by judicial discretion to situations where the wrongful conduct of the complainant did not constitute a ground for a divorce, but induced such conduct on the part of the defendant.

The doctrine of recrimination, in relation to divorce actions, is quite ancient, as indicated in 2 Bishop on Marriage, Divorce and Separation, secs. 372 to 376, inclusive. It was a question, as will be seen, for a time, whether fault of the plaintiff should bar a divorce unless of the same grade as the fault charged against the defendant, as for instance, whether, in case of the latter charge being adultery, cruel and inhuman treatment on the part of the complainant would bar a recovery. The negative has been held in some state courts (*Dillon v. Dillon,* 32 La. Ann. 643), but, in general, it has been held in this country that conduct of the plaintiff constituting any cause for a divorce is a bar to an action for a divorce by such party on any ground. 2 Bishop, Mar., Div. & Sep. §§ 377, 378. Such is the rule, as stated in *Pease v. Pease, supra.* The prevailing doctrine is thus stated in 2 Bishop, § 340: "Recrimination in divorce law is the defense that the applicant has himself done what is ground for divorce. . . . It bars the suit founded on whatever cause, whether the defendant is guilty or not." On the same subject, §§ 349, 365, and 368. This court went no further in *Pease v. Pease, supra.* The gist of the decision is correctly stated in the syllabus thus: "Where it is shown that each party has been

guilty of an offense which the statute has made a ground for divorce in favor of the other, the court will not grant relief to either." It is said in the opinion that such is the law in jurisdictions having written laws similar to our own, citing many authorities.

In the cases here subsequent to *Pease v. Pease,* the doctrine of the latter was not extended, as will be seen when the facts of the later cases are understood, though this language quoted in *Hubbard v. Hubbard,* 74 Wis. 650, 43 N. W. 655, from the opinion in *Otway v. Otway,* L. R. 13 Prob. Div. 141, is otherwise suggestive: "A judicial separation can only be granted when the petitioner comes to the court with a pure character, and is free from all matrimonial misconduct;" but the case shows the court was dealing with a situation of mutual misconduct, each party being guilty of conduct constituting ground for a divorce. It was conduct of that character that the quoted language was addressed to and not to cases, in general, of want of "pure character" or of "matrimonial misconduct." In *Voss v. Voss,* 157 Wis. 430, 147 N. W. 634, there was mutual misconduct of the nature required by the rule stated in *Pease v. Pease, supra.* It is very certain that this court did not intend to otherwise state the law in *Hubbard v. Hubbard, supra.*

The result of the foregoing is that, unless respondent was guilty of matrimonial misconduct constituting good ground for an action for a divorce, there is nothing in the evidence barring her from maintaining her action, even if it does disclose conduct on her part which might, properly, have been, and probably was, considered on the question whether it so far provoked appellant to his misconduct as to justify or require a conclusion that it fails to satisfy the call of the statute for cruel and inhuman treatment. There are no findings on the subject of matrimonial misconduct of plaintiff. None seem to have been requested. We must assume the trial court was of the opinion that the evidence did not warrant any which would bar her from obtaining relief, in case she estab-

lished her charge of cruel and inhuman treatment against appellant, or excusing his wrongful conduct. We are unable to see our way clear to disturb such conclusion.

The question is raised on behalf of appellant as to whether, in any event, the circumstances mentioned in the findings warranted the conclusion that appellant was guilty of cruel and inhuman treatment of respondent. There is no specific finding of fact on the subject, but we take the conclusion of law as inferentially finding that the long continued course of ill-treatment of respondent, mentioned, imperiled her health, made her marriage state intolerable, and rendered her incapable of performing the duties of a wife. This court has often held that treatment which does, or is well calculated to, produce such results, satisfied the "cruel and inhuman treatment" of the statute. *Freeman v. Freeman,* 31 Wis. 235, 248; *Reinhard v. Reinhard,* 96 Wis. 555, 71 N. W. 803; *Kohl v. Kohl,* 143 Wis. 214, 125 N. W. 921; *Banks v. Banks,* 162 Wis. 87, 155 N. W. 916.

It does not seem, by the later authorities, that actual impairment of health, caused by ill-treatment without violence, actual, threatened, or probable, is essential to cruel and inhuman treatment. If the conduct of the guilty party is such as to naturally cause great mental suffering to the other, and render impairment of health probable, so that further efforts to perform the duties of the marriage state would be dangerous, that is sufficient. That is the effect of *Kohl v. Kohl, supra.* The wife need not submit to such treatment until actually broken down in health before being competent to successfully claim a judicial separation on the ground of cruel and inhuman treatment. This court has departed from the doctrine, which obtains in some jurisdictions, that personal violence, actual or so threatened as to reasonably produce a belief of its being probable, is essential to cruel and inhuman treatment, and adopted the more humane construction of the statute above indicated.

Our conclusion is that the decision of the trial court on the

subject above discussed should not be disturbed, though the findings would be much more satisfactory if they contained a specific decision that the wrongful conduct referred to imperiled the health of respondent and rendered continuance of living together by the parties as man and wife intolerable and dangerous to her. Ill-treatment of the character mentioned in the findings might or might not have that effect, according to the temperament of the wife and her surroundings. The court saw respondent and, doubtless, concluded that she could not be subjected to such treatment and be expected to preserve her health or be able to perform her duties as a wife. That, as before stated, can well be read out of the conclusion as to appellant's guilt, presuming that the circuit judge was, as he must have been, familiar with the long established law here.

In the cost bill an item of $25 was allowed as expenses incurred by a court commissioner before whom there was an examination of appellant under the statute. Complaint is made of such allowance, also of the amount appellant was required to pay respondent for support of the minor children and of the amount which was awarded as her share on a division of property.

We do not perceive any efficient merit in the complaint of the $25 item. The expense seems to have been actually incurred by the court commissioner, and necessarily, in his judgment. We are unable to conclude that it was not so under the circumstances.

The allowance for support of the minor children, though quite liberal, does not appear to be so clearly excessive as to warrant overruling the trial court's judgment.

After a careful consideration of the disposition of the subject of division of property, it is considered that it should not be disturbed. The well established rule is that, in general, a liberal amount to be allowed to the divorced wife is one third in money value of the husband's property. That may be increased to one half or more for special circum-

stances. *Edleman v. Edleman,* 125 Wis. 270, 104 N. W. 56; *Von Trott v. Von Trott,* 118 Wis. 29, 94 N. W. 798; *Lindenmann v. Lindenmann,* 118 Wis. 175, 95 N. W. 96. It does not clearly appear that there was a departure here from that rule. The court, doubtless, considered that the value of appellant's interest in the $9,000 drug business was sufficient to warrant the award to respondent which was made and it is considered that the evidence does not clearly preponderate against that view. He had been allowed for a long time to deal with the property very much as if he were the owner and, evidently, the trial court came to the conclusion that he, substantially, was such.

By the Court.—The judgment is affirmed.

FORT WAYNE PRINTING COMPANY, Appellant, vs. HURLEY-REILLY COMPANY, Respondent.

April 11—May 2, 1916.

Sales: Acceptance: Contracts: Parties.

1. Defendant gave plaintiff a written order for certain printed matter to be used as part of a posting system. Plaintiff manufactured the goods and delivered to defendant certain boxes and also itemized invoices of the goods, with prices, and demanded payment. Defendant received and retained the boxes without examining or inspecting the contents, but refused to pay for the goods unless one H. would install the posting system, claiming that plaintiff and H. jointly contracted to furnish and install the system. *Held,* that such facts sufficiently show an acceptance by defendant of the contents of the boxes as being the goods specified in the invoices and as complying with the written order.
2. Findings by the court to the effect that plaintiff was not a party to the contract for installing the posting system, and that plaintiff's agreement to furnish the goods included in the written order was a transaction separate from and independent of any contract between H. and the defendant, are *held* to be sustained by the evidence.

APPEAL from an order of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Reversed.*

The action was brought for the recovery of the purchase price of goods, wares, and merchandise made and sold by the plaintiff to the defendant on defendant's order.

The defendant company through its general manager gave an order in the month of April, 1913, for printed matter to be furnished and delivered by the plaintiff, which was to be used for the purpose of installing the Houghton Self-Proving Posting System for the defendant company. The plaintiff claims that the testimony shows that part of these goods were received by the defendant company between May 13 and July 7, 1913. The claim is that these goods were sent in boxes which at the time of trial had not been examined by the defendant company, but had been received at its office and are still there in the original packages. The plaintiff alleges that one Houghton agreed with defendant to install the posting system and that plaintiff accepted the order to furnish the printed material. Sometime after ordering this printed matter the defendant ordered a special typewriter attachment which had been patented by Houghton and was owned by him and Wilding, manager of the plaintiff company, and which was a part of this system. When part of the printed matter had been shipped, plaintiff demanded $381.27 as payment therefor. Houghton had not installed the system. The defendant alleges that the contract for the system and this material was one jointly with Houghton and the plaintiff and refused to pay until the system was installed.

The civil court found that Houghton was not an agent of the plaintiff; that plaintiff did not agree to install the posting system; and that plaintiff has complied with the order for the printed matter and is entitled to judgment for the sum of $381.27, the value of the goods delivered, with interest thereon from July 7, 1913. On defendant's appeal to the circuit court the judgment of the civil court was reversed on

the ground that there was a failure of proof to show that the boxes plaintiff shipped defendant contained the goods specified in defendant's written order, and entered an order for a new trial directing that the action be tried in the circuit court in the same manner as if originally brought therein. From such order of the circuit court this appeal is taken.

For the appellant there was a brief by *B. F. Saltzstein,* and oral argument by *Peter R. Feldman.*

For the respondent there was a brief by *Austin, Fehr & Gehrz,* and oral argument by *G. G. Gehrz.*

SIEBECKER, J. It is held in this case that the circuit court erred in reversing the judgment of the civil court and awarding a new trial of the action. The civil court found as facts that the defendant made a written order for the printed matter to be furnished it as a part of the posting system; that the plaintiff had complied with this order by delivering the goods included in the written order; that defendant retained and accepted them, and that plaintiff is entitled to payment therefor in the amount shown by the bills plaintiff presented to defendant after the delivery of the goods. The circuit court held that the record disclosed "no competent proof whatever as to the nature of the contents of the boxes which were shipped by the plaintiff to the defendant between May 13, 1913, and July 7, 1913." There is no dispute as to the written order for the printed matter and the receipt by defendant of the boxes which plaintiff claims contained the goods at the time alleged and the possession thereof by defendant at the time of trial. The plaintiff sent defendant invoices purporting to contain itemized statements of the goods with prices, as ordered, and claims that the goods defendant ordered are contained in the boxes defendant received. It appears that plaintiff's manager had no personal knowledge of the contents of these boxes, but that the freight bills of their shipment came to his notice; also that the invoices were sent to

defendant and payment demanded; that defendant acknowledged receipt of the boxes with contents, but refused to pay for the goods unless Houghton would install the system as he had agreed. The facts and circumstances showing that plaintiff manufactured the goods, that it shipped the boxes, that it sent defendant invoices specifying what it claimed the boxes contained, and that defendant received the boxes and invoices and retained them without examining and inspecting the contents, permit of the inference that the plaintiff shipped and delivered and that defendant accepted the goods and that they are of the nature and kind specified in the invoices defendant received. The conduct of defendant's officers harmonizes with the inference that they considered the boxes contained the goods for which defendant gave its written order. The conduct of the parties pertaining to these business affairs is in accord with the usual and customary practices that are followed by dealers in commercial transactions. The defendant's officers, under the facts and circumstances of this transaction which were brought to their attention, became sufficiently informed of the contents of these boxes and that the itemized invoices expressed in writing what these boxes contained, so that when they received and retained them they accepted them with the understanding and assent that the goods thus delivered were the goods specified in the invoices and comply with the written order. Under the terms of the written order it must be considered that the plaintiff appropriated the goods to the order when it shipped them and that defendant's dealing therewith, in the light of the information its officers had, is an acceptance of them as a compliance with the written order. Secs. 1684*t*—47, 1684*t*—48, Stats. 1915; *J. Thompson M. Co. v. Gunderson,* 106 Wis. 449, 82 N. W. 299; *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, 89 N. W. 538, 92 N. W. 246; *Northern S. Co. v. Wangard,* 117 Wis. 624, 94 N. W. 785; *Forster, Waterbury Co. v. F. MacKinnon M. Co.* 130 Wis. 281, 110 N. W. 226.

The civil court found, and the circuit court affirmed the findings, that Houghton was not an officer or agent of the plaintiff, nor acting for it respecting the installation of the posting system; that plaintiff was in no manner a party to the contract existing between Houghton and defendant for the installation of this system; and that plaintiff's agreement to furnish defendant the goods included in the written order was a transaction separate from and independent of the contract between Houghton and defendant. The defendant assails these conclusions of the civil court and claims that the facts and circumstances of the two transactions show that it was understood and agreed that the written order was made a part of the agreement with Houghton for the installation of the system and that the goods were ordered on the condition that the system would be furnished and installed by Houghton. We have examined the record and find the evidentiary facts and circumstances bearing on these issues permit of the inference that plaintiff is not a party to the contract for installing the system and that the written order for these goods was not conditional on Houghton's performance of his agreement with defendant. In view of this state of the record it cannot be said that these findings of the civil court are clearly wrong.

The exceptions to the refusal of the court to strike out the testimony of Wilding are not well taken. The evidence was properly received.

By the Court.—The order appealed from is reversed, and the cause remanded to the circuit court with direction to affirm the judgment of the civil court.

HOEFFLER MANUFACTURING COMPANY, Appellant, vs. CASUALTY COMPANY OF AMERICA, imp., Respondent.
SAME, Respondent, vs. MACHAJEWSKI, imp., Appellant.

April 11—May 2, 1916.

Replevin: Return of property to defendant: Void undertaking: Liability of surety: Judgment: Form: Evidence: Discharge in bankruptcy: Chattel mortgages: Waiver of lien: Appeal: Disposition of case.

1. Where, in a replevin action, an undertaking given to secure the return of the property to the defendant was not the undertaking required by sec. 2722, Stats.,—being in this case an undertaking to secure the sheriff on seizure of property under an attachment or execution,—the plaintiff cannot have judgment against the surety.
2. In such a case, the undertaking given being void and no undertaking having been given under sec. 2722, Stats., a judgment absolutely for the value of the property, instead of in the alternative, was erroneous, not being authorized by sec. 2888.
3. In replevin by a chattel mortgagee, evidence of the discharge of the defendant in bankruptcy was immaterial, since it would not affect plaintiff's right of recovery if he had a lien on the property under the mortgage.
4. Where, in such action, after the rendition of an erroneous judgment absolutely for the value of the property, the plaintiff caused the property to be seized and sold on execution, and bid it in, thus obtaining by an irregular proceeding what he would have obtained had he taken the proper judgment, such acts did not operate as a waiver of his lien under the chattel mortgage.
5. Upon reversal of the erroneous judgment in such case, this court directs the entry of the proper judgment in the alternative, under sec. 2888, Stats., and that the execution and all proceedings thereunder be annulled.

APPEALS from an order and a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Order affirmed; judgment reversed.*

The plaintiff brought an action of replevin and seized certain property under the writ, viz. one electric piano and three music rolls sold to defendant *Machajewski* by plaintiff on the

16th day of September, 1912, for $700. The plaintiff took an old piano at the agreed price of $200 in part payment, leaving a balance due of $500, which amount was to be paid in monthly instalments and evidenced by twenty-five promissory notes, which notes were secured by chattel mortgage on the instrument sold to defendant *Machajewski*. Before delivery of the property to plaintiff the defendant *Machajewski* attempted to give a bond under sec. 2722, Stats., to secure possession thereof, with the respondent, *Casualty Company of America* of New York, as surety. The bond was as follows:

"Know all men by these presents, that we, *John Machajewski* and the *Casualty Company of America* of New York, of the county of Milwaukee and state of Wisconsin, are held and firmly bound unto Lawrence McGreal, sheriff of the county of Milwaukee, in the sum of fourteen hundred and 00/100 dollars to be paid to the said Lawrence McGreal, his executors, administrators, and assigns, to which payment well and truly to be made we jointly and severally bind ourselves, our heirs, executors, and administrators firmly by these presents.

"Sealed with our seals and dated this 22d day of January, 1913.

"Whereas, an attachment issuing out of the circuit court in and for the county of Milwaukee, in favor of *Hoeffler Manufacturing Company* and against *John F. Machajewski*, has been directed and delivered to the said Lawrence McGreal, sheriff of the county of Milwaukee, by virtue of which the sheriff, at the request of the *Hoeffler Manufacturing Company*, is about to seize and levy on certain personal property, about which there is reasonable doubt as to the ownership or its liability to be taken on said execution, to wit: 'Replevin of electric piano valued at seven hundred dollars, for nonpayment on account of misrepresentation by plaintiff:'

"Now, therefore, the condition of this obligation is such, that if the said *John F. Machajewski* shall well and truly indemnify and save harmless the said Lawrence McGreal, sheriff as aforesaid, his deputies and persons acting under his or their authority, and each and every one of them, against all suits, judgments, executions, troubles, costs, charges, and expenses arising or which may be suffered or sustained by him

or any of them by reason or consequence of such levy and seizure or of the subsequent proceedings thereon, without limit to the amount of said costs, charges, and expenses, whatever they may be, then this obligation to be void, otherwise to be and remain in full force.

(Signed) "JOHN F. MACHAJEWSKI. (Seal.)
"CASUALTY COMPANY OF AMERICA,
"By Jacob Kramer, its Attorney in Fact. (Seal.)
"Signed, sealed, and delivered in presence of
"Edgar Prokriefke,
"Elenor Pederson."

On the execution and delivery of the foregoing bond the sheriff delivered the property to the defendant *Machajewski.*

The defendant *Machajewski* appeared and answered but made no defense in the first trial, and judgment was rendered against him and the *Casualty Company of America* of New York on the 26th day of June, 1914, for the sum of $496.21, being amount due plaintiff from defendant on the notes and mortgage at that time, together with $49.11 costs. Afterwards, upon application of the defendant *Machajewski,* he was permitted to open the judgment and defend. The case was afterwards tried by the court and a jury, and the jury found that the plaintiff was entitled to possession of the property mentioned in the complaint, that the defendant unlawfully withheld the same, that damages for unlawful detention were six cents, that the value of the property was $700 and the amount due upon the notes and mortgage $546.84, and that the plaintiff was entitled to judgment for the possession of the property or to a judgment for the value thereof against the defendant *Machajewski.*

Judgment was rendered on the 26th day of May, 1915, against the defendant and the *Casualty Company of America* of New York for $546.84, together with $61.10 costs as taxed and allowed, making in all $607.96.

The judgment also recites that the property was delivered to the defendant *Machajewski* pursuant to sec. 2722, Stats., and that the *Casualty Company* is the surety who signed and

executed the written undertaking pursuant to said section; and further recites that the plaintiff elected to take judgment absolutely for the value of the property.

On motion of the respondent *Casualty Company* an order was made by the court vacating and setting aside the judgment as to it, and the plaintiff appealed from said order.

The defendant *John F. Machajewski* appealed from the whole judgment.

The cause was submitted for the plaintiff on the briefs of *A. J. Eimermann;* for the defendant *Casualty Company* on that of *Williams & Stern;* and for the defendant *Machajewski* on a brief signed by *W. J. Kershaw,* attorney, and *R. I. Kenney,* of counsel.

KERWIN, J. It is clear that the bond executed by the *Casualty Company* on delivery of the property to the defendant *John F. Machajewski* was not the bond required by sec. 2722, Stats. As will be seen from the statement of facts, the bond given was a bond to secure the sheriff on seizure of property under an attachment or execution.

Where property has been taken on writ of replevin, the statute, sec. 2722, provides that:

"At any time before the delivery of the property to the plaintiff the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant. . . ."

No bond in compliance with this section was given, and the bond given as a bond for return of the property to plaintiff, not being in compliance with the statute, was void, and no valid judgment could be rendered against the surety thereon in the replevin action.

The court could enter judgment against the *Casualty Company* in the replevin action only upon an undertaking in compliance with the provisions of sec. 2722, Stats., namely, for the delivery of the property to the plaintiff if delivery be adjudged, and for the payment to plaintiff of such sum as may be recovered against the defendant. *Drinkwine v. Eau Claire,* 83 Wis. 428, 53 N. W. 673; *Baxter v. Berg,* 88 Wis. 399, 60 N. W. 711; *Mayhew v. Mather,* 82 Wis. 355, 52 N. W. 436; *Woolridge v. Quinn,* 49 Mo. 425; *Dillard v. Nelson,* 78 Ark. 237, 95 S. W. 460; *I. L. Lamm Co. v. Peaks,* 162 Wis. 289, 156 N. W. 194; *Chaffee v. Sangston,* 10 Watts, 265. It follows from what has been said that the judgment against the *Casualty Company* was properly set aside and vacated.

On the appeal of the defendant *John F. Machajewski* it is insisted that, the bond being void, the court had no power to enter the judgment. *Mayhew v. Mather,* 82 Wis. 355, 52 N. W. 436.

Where no bond is given for delivery of the property to defendant under sec. 2722, Stats., the judgment may be under sec. 2888, Stats., which provides that judgment for the plaintiff may be for possession or recovery of possession of the property, or the value thereof in case a delivery cannot be had, and damages for detention; and when the property shall have been delivered to defendant under sec. 2722, judgment may be as aforesaid or absolute for the value of the property and damages for detention, at the plaintiff's option. In the instant case judgment was taken absolutely for the value of the property and not in the alternative as provided in sec. 2888, Stats. The judgment obviously was entered on the theory that the bond given by the *Casualty Company* was a valid bond under sec. 2722. But the bond being void and no bond having been given for return of the property to plaintiff, the judgment entered was erroneous and not the judgment authorized by statute where no bond was given under sec. 2722. *Mayhew v. Mather,* 82 Wis. 355, 52 N. W. 436; *Baxter v. Berg,* 88 Wis. 399, 60 N. W. 711.

It is also insisted that the court below erred in excluding evidence of the record of discharge of defendant from his debts in bankruptcy proceedings before the rendition of the judgment below. In the replevin action this record was immaterial, because it would not affect the plaintiff's right to recover if it had a lien on the property under the mortgage which was the basis of plaintiff's right to recover.

It further appears that after rendition of the judgment appealed from the plaintiff caused execution to be issued on the judgment and levy made upon the property which was the subject of the replevin suit, and the property advertised, offered for sale, and bid in by plaintiff. It is claimed by defendant *John F. Machajewski* that these acts by the plaintiff operated as a waiver of the plaintiff's lien under its mortgage. We do not think the facts show a waiver of lien under the mortgage.

The difficulty arose from the error in entering judgment for the value of the property instead of a judgment in the alternative for possession, or value in case delivery could not be had. Since the plaintiff under the judgment taken could not obtain possession under the judgment, it obviously adopted, as a means of getting possession, an execution. The plaintiff obtained by an irregular proceeding what it would have obtained by a regular proceeding had it taken a proper judgment. So we think there was no waiver of plaintiff's lien under its mortgage. But as the record now stands, the plaintiff has the property and also a judgment for its value, less what was applied on the judgment under the irregular sale on execution. We think, however, that complete justice may be done between the parties by entering a judgment under sec. 2888, Stats., for possession of the property, or the value thereof in case a delivery cannot be had, and six cents damages for detention and costs, and that the execution and all proceedings thereunder be set aside and annulled. This will leave the plaintiff all it was entitled to in the replevin action.

By the Court.—On the appeal of plaintiff from the order

vacating the judgment against the *Casualty Company of America* of New York the order is affirmed with costs.

On the appeal of the defendant *John F. Machajewski* the judgment is reversed, and the cause remanded with instructions to the court below to enter judgment as indicated in this opinion, with costs in this court in favor of defendant *John F. Machajewski.*

MIDLAND TERRA COTTA COMPANY, Appellant, vs. ILLINOIS SURETY COMPANY, imp., Respondent.

April 12—May 2, 1916.

Pleading: Joinder: Causes of action must affect all parties.

1. **Sec. 2647, Stats. 1913, as amended by ch. 219, Laws 1915, still requires that all causes of action united in a complaint must affect all of the parties to the action.**
2. **Thus, a cause of action against a building contractor for the amount due for materials purchased and against the owner on his express promise to pay therefor if plaintiff would forego a lien, could not properly be joined with a cause of action for the same debt against the contractor and against a surety company which was liable therefor on the contractor's bond.**

APPEAL from an order of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

Action for the purchase price of material sold and delivered to J. W. Utley, the principal contractor for the construction of a building owned by the Edward Schuster & Co. Inc. The *Illinois Surety Company* is joined as a defendant because it indemnified the Edward Schuster & Co. Inc. by a bond against any failure of the contractor to duly perform his contract, which bond contains this provision:

"The condition of this bond is such that if the principal shall faithfully perform the contract on his part, and satisfy all claims and demands incurred for the same, and shall fully indemnify and save harmless the owner from all cost and damage which he may suffer by reason of failure to do so, and

shall fully reimburse and repay the owner all outlay and expense which the owner may incur in making good default, then this obligation shall be null and void; otherwise it shall remain in full force and effect."

Two causes of action are set out in the complaint, one against Utley upon his contract of purchase, and against the Edward Schuster & Co. Inc. upon its express agreement with plaintiff to pay for the material furnished if plaintiff would forbear to file a mechanic's lien against the premises, which it forbore to do relying upon such agreement; the other, against Utley upon the same contract of purchase and against the *Illinois Surety Company* upon its liability on the bond.

The *Illinois Surety Company* demurred to the complaint on the ground that several causes of action have been improperly united therein for the reason that the causes of action stated in the complaint do not affect all the parties to the action. The court sustained the demurrer and the plaintiff appealed.

G. J. Davelaar, for the appellant, cited secs. 2603, 2610, 2647, 2656*a,* 2883, Stats. 1915; *Gager v. Marsden,* 101 Wis. 598, 605, 606, 77 N. W. 922; *Kollock v. Scribner,* 98 Wis. 104, 113, 73 N. W. 776; *Herman v. Felthousen,* 114 Wis. 423, 90 N. W. 432; *Warren Webster & Co. v. Beaumont H. Co.* 151 Wis. 1, 138 N. W. 102; *Hausmann Bros. Mfg. Co. v. Kempfert,* 93 Wis. 587, 67 N. W. 1136; *St. Croix T. Co. v. Joseph,* 142 Wis. 55, 124 N. W. 1049; *O'Malley v. Miller,* 148 Wis. 393, 134 N. W. 840; *Hemenway v. Beecher,* 139 Wis. 399, 401, 402, 121 N. W. 150; *McDougald v. New Richmond R. M. Co.* 125 Wis. 121, 103 N. W. 244; *State ex rel. Mengel v. Steber,* 154 Wis. 505, 143 N. W. 156.

For the respondent there was a brief by *Flanders, Bottum, Fawsett & Bottum,* and oral argument by *R. N. Van Doren* and *Arnold C. Otto.*

VINJE, J. In the case of *Concrete S. Co. v. Illinois S. Co., ante,* p. 41, 157 N. W. 543, it was held that the *Illinois Surety Company* was directly liable to a subcontractor under

the provisions of its bond set out in the statement of facts. The defendant Edward Schuster & Co. Inc. is liable upon its express promise to pay, given as a consideration for plaintiff's forbearance to perfect a mechanic's lien. The defendant Utley is liable upon both causes of action set out in the complaint, for they are both based upon the same facts, namely, that he purchased and agreed to pay for the materials. We have, therefore, this situation: One defendant is liable on both causes of action, each of the other two defendants is liable upon a separate cause of action from the other, and is in no way related to or affected by the cause of action pleaded against its codefendant. The Edward Schuster & Co. Inc. is not a party to nor affected by the provision in the bond that renders the *Illinois Surety Company* liable to the plaintiff, and the *Illinois Surety Company* in turn is not a party to nor affected by the promise of Edward Schuster & Co. Inc. to pay plaintiff for the material if it would forbear to file a lien. Both these defendants are sued upon an independent promise individual to itself. The fact that it is for the same debt makes no difference. The statutory test is not whether the causes of action pleaded arise out of the same transaction, but whether they affect all the parties to the action. Plaintiff may have two recoveries, but it can have only one satisfaction.

Sec. 2647, Stats. 1913, as amended by ch. 219, Laws 1915, still requires that all causes of actions united in a complaint must affect all the parties to the action. This complaint violates that section, in that the cause of action set out against the *Illinois Surety Company* does not affect the Edward Schuster & Co. Inc. and in that the cause of action against the latter does not affect the former. The cases cited by plaintiff do not touch the precise question at issue. They relate generally to the subject of who are necessary or proper parties to an action. The requirement that the causes of action which may be united in a complaint must affect all the parties to the action is as imperative now as it has been ever since

sec. 2647 was first enacted. Our court has uniformly held that causes of action founded upon different rights of recovery cannot properly be united unless all the parties to the action are affected by each cause pleaded. *Greene v. Nunnemacher,* 36 Wis. 50; *Hoffman v. Wheelock,* 62 Wis. 434, 22 N. W. 713, 716; *Hughes v. Hunner,* 91 Wis. 116, 64 N. W. 887; *Blakely v. Smock,* 96 Wis. 611, 71 N. W. 1052; *Hawarden v. Youghiogheny & L. C. Co.* 111 Wis. 545, 87 N. W. 472; *Tyre v. Krug,* 159 Wis. 39, 149 N. W. 718.

By the Court.—Order affirmed.

INTERIOR WOODWORK COMPANY, Respondent, vs. JAHN and others, imp., Respondents, and HACKETT, HOFF & THIERMANN, INC., Appellant.

April 12—May 2, 1916.

Mechanics' liens: Notice required: Principal contractors: Statutes: Amendment: Construction.

1. **Under ch. 213, Laws 1913, amending sec. 3315, Stats., a principal contractor, in order to be entitled to a lien, was required to serve a notice within sixty days after performing work or labor or furnishing materials, stating the amount due and the fact that a lien was claimed therefor.**
2. **The supreme court has no power to amend a statute; it can only, in cases of doubt, ascertain and declare the intent of the legislature.**

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

Action to enforce mechanic's lien. Plaintiff commenced this action to enforce its claim for mechanic's lien against the property of the defendants McEvoy. The defendant *Hackett, Hoff & Thiermann, Inc.,* is a mortgagee, having a mortgage upon the same property upon which the lien is claimed,

which mortgage is admittedly subsequent to the lien of plaintiff and other lien claimants.

The trial court found for the lien claimants, gave judgment establishing their liens upon the property in question, and the mortgagee brings this appeal therefrom.

For the appellant there was a brief by *J. O. Carbys* and *Christian Doerfler,* and oral argument by *Mr. Carbys.*

For the respondents there was a brief by *E. J. Ludwig,* attorney for *Frank Luenzmann Company, Charles J. Weaver,* attorney for *Ernst Jahn, Arthur Breslauer,* attorney for *Phillip Gross Hardware Company,* and *John H. Paul,* attorney for *Interior Woodwork Company;* and the cause was argued orally by *Mr. Ludwig.*

ROSENBERRY, J. There is but one question submitted for determination in this case. Under the provisions of ch. 213 of the Laws of 1913, amending sec. 3315, Stats., were principal contractors required to serve a notice within sixty days after performing work, labor, or furnishing material, stating the amount of the claim and the fact that a lien was claimed therefor? This depends upon the construction to be given to sec. 3315 as amended. Sec. 3315, Stats. 1913, is the result of an amendment of a prior law upon the same subject. By the amendment certain provisions of sec. 3315, Stats. 1911, were stricken out and the section was rewritten in other particulars not involved in the determination of this question. The section as it stood before it was amended by ch. 213 of the Laws of 1913 was as follows, the words stricken out of sec. 3315, Stats. 1911, being printed in italics, the only change made in that part of the section material here being the omission of the italicised words:

"Section 3315. Every person who, *as subcontractor of a principal contractor or as an employee of either,* performs any work or labor for or furnishes any materials *to either* in any of the cases mentioned in the preceding section may have the lien and remedy given by this chapter if, within sixty days after performing such work or labor or furnishing such ma-

terials, he shall give notice in writing to the owner, or his agent, of the property to be affected by such lien, if to be found in the county, and if neither can be found therein, by filing such notice in the office of the clerk of the circuit court of said county, setting forth that he has been employed *by such principal contractor or subcontractor* to perform or furnish, and has performed or furnished, such work, labor or material, with a statement of the labor performed or the materials furnished, the amount due therefor *from such principal contractor or subcontractor,* and that he claims the lien given by this chapter. In all cases where a lien shall be filed under the provisions of this chapter by any person other than the principal contractor it shall be his duty to defend any action brought thereupon at his own expense, and during the pendency of such action the owner may withhold from the contractor the amount of money for which such lien shall be filed; and in case of judgment against the owner or his property upon the lien he may deduct from any amount due by him to the contractor the amount of such judgment and costs, and if he shall have settled with the contractor in full may recover from him any amount so paid for which the contractor was originally liable. . . ."

How can there be any possible doubt that the legislature intended to change the policy of the law and require a notice to be given within sixty days by a principal contractor? What other purpose could the legislature have had in striking out the italicised words? To state these questions is to answer them. That such was the intention of the legislature is too plain to require argument or restatement. It is claimed that by the insertion of the word "other" after the word "every" in the first line, the statute would then have the same meaning that it had prior to the amendment. This court has no right or power to amend the statutes either by the insertion of one word or many words. It is the duty of this court in cases of doubt to ascertain and declare the intent of the legislature. Where there is no doubt as to that intent this court has no duty to perform. *State ex rel. Husting v. Board of State Canvassers,* 159 Wis. 216, 226, 238, 150 N. W. 542.

It being conceded that no notice was given as required by

the section as it stood at the time the labor and material were furnished, the judgment of the circuit court establishing the liens of claimants and directing foreclosure thereof is erroneous and should be reversed. Under sec. 3324, Stats. 1915, the lien claimants are entitled to judgment for the amounts due them.

By the Court.—Judgment reversed, and cause remanded with directions to the circuit court to enter a personal judgment in favor of the lien claimants for the amounts found due them and in accordance with this opinion.

TANNER, Respondent, vs. TOWN OF RUSHFORD, Appellant.

April 12—May 2, 1916.

Highways: Bridges: Insufficiency: Injury to horse: Proximate cause: Questions for jury.

1. In an action for injury to plaintiff's horse alleged to have been caused by its catching the toe-calk on one of its shoes in a crack between the planks forming the roadway of a bridge, there being evidence that the planks were laid crosswise and that there were cracks from a quarter of an inch to more than an inch between them, the question whether such cracks constituted an insufficiency rendering the bridge not reasonably safe, and also the question whether plaintiff was guilty of a want of ordinary care in attempting to drive across it, were for the jury.
2. A finding by the jury in such case that the injury to the horse, involving a fracture of the ilium and lameness, was proximately caused by the unsafe condition of the bridge is *held* to be sustained by the evidence.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

This is an action for injuries to plaintiff's horse resulting from a defective bridge. The alleged defect consisted in the fact that the planks forming the roadway of the bridge were placed so far apart as to leave wide cracks running crosswise

of the bridge from a quarter of an inch to more than an inch in width. The testimony tended to show that on the morning of December 30, 1913, the plaintiff's mare, while being driven across the bridge by an employee, caught the toe-calk of the shoe on the hind foot in one of these cracks, causing her to stop suddenly and bringing the foot back under the whiffletrees of the wagon; that the mare then pulled the foot out and went along; that no immediate lameness appeared, but that during the forenoon, while hauling sand, she was observed to be lame, and was very lame on the following day, and remained unable to work for sixty days. There was also testimony tending to show that the mare had a fractured ilium and that such a result might naturally follow such an occurrence.

The jury returned the following special verdict:

"(1) Was the plaintiff's horse injured on the said bridge at the time and place alleged in the complaint? *A.* Yes.

"(2) Was the said bridge in an insufficient condition and in want of repair so as not to be reasonably safe for the passage of teams over it at the time of said accident? *A.* Yes.

"(3) If you answer question 2 'Yes,' then was such condition the proximate cause of the injury to plaintiff's horse? A. Yes.

"(4) If you answer question 2 'Yes,' did the defendant town have notice of the insufficient condition of said bridge in time to have repaired the same in the exercise of ordinary care and prudence? *A.* Yes.

"(5) Was the plaintiff guilty of a want of ordinary care and prudence which contributed to said injury? *A.* No.

"(6) If the plaintiff is entitled to recover, at what sum do you assess his damages? *A.* $230."

From judgment for the plaintiff on the verdict the defendant appeals.

Wilbur E. Hurlbut, for the appellant.

For the respondent there was a brief by *Williams & Williams,* and oral argument by *Charles H. Williams.*

WINSLOW, C. J. The special verdict covers fairly and fully all the issues in the case and we find it necessary to consider but three contentions, viz.: *first,* that no actionable defect in the bridge was proven; *second,* that if any defect was proven the plaintiff was guilty of contributory negligence in sending his team across the bridge when he knew of the defect; and *third,* that the evidence fails to show that the defect in the bridge caused the injury. These questions will be briefly treated in the order stated.

1. This question is somewhat close. Towns do not insure safety on roads or bridges and not every departure from the safest methods can be called a defect. Ordinarily, however, it is a jury question under proper instructions.

There can be little doubt, we think, that the long and substantial calks which are necessarily placed upon the shoes of a horse in winter are quite likely to be caught and wedged into such cracks as existed in the roadway of this bridge. It goes without saying that when a horse's foot is thus suddenly caught and held, the wrench thereby resulting may easily cause a temporary or permanent injury to the horse. It is clear from the evidence that the difficulty is avoided in many bridges either by laying the planks close together or by laying them longitudinally or diagonally. We are unable to say as matter of law that there was no actionable defect in the present instance.

2. The defect here was not of so serious or dangerous a character as to render any attempt to cross the bridge palpable negligence; in other words, the danger was not imminent. In such cases the question is whether a reasonably prudent man, exercising ordinary care, would attempt to proceed, and this question is for the jury. *Gerrard v. La Crosse City R. Co.* 113 Wis. 258, 89 N. W. 125; *Dralle v. Reedsburg,* 130 Wis. 347, 110 N. W. 210.

3. The evidence justifies the conclusion that the fracture of the ilium and the lameness were the result of the wedging

of the toe-calk in the crack and the sudden stopping of the horse's progress thereby. It appeared that the lameness was first noticed a short time afterwards, that it rapidly grew worse, and that the sixty days' disability followed without interruption in the symptoms. Probably the jury would have been justified in finding that the injury resulted from a strain incurred while hauling sand after the bridge incident, but this was a question for them to decide. A number of detail errors are alleged, none of which are considered to be of sufficient importance to demand special treatment.

By the Court.—Judgment affirmed.

RIGGLES, Appellant, vs. PRIEST, Respondent.

April 12—May 2, 1916.

Automobiles: Rules of the road: Collision with bicycle: Negligence: Questions for jury: Unlawful speed: Instructions to jury: Harmless error: Contributory negligence: Gross negligence.

1. The "general and usual rules of the road" which, by sec. 1636—49, Stats. 1911, the driver of an automobile was required to observe, did not absolutely preclude him from seasonably invading his left-hand side of the traveled way in passing a vehicle in front of him.
2. Whether in this case the defendant—whose automobile, while passing another car from behind, collided with a bicycle which plaintiff was riding in the opposite direction near the center of the street—was guilty of negligence in driving upon his left-hand side of the street is *held*, under all the circumstances, to have been a question for the jury.
3. For defendant to drive his automobile at a speed of more than ten miles per hour while within 150 feet of and about to pass the plaintiff was in direct violation of sec. 1636—49*a*, Stats. 1913, and was negligence as a matter of law.
4. Refusal of the trial court to instruct the jury that such violation by defendant of sec. 1636—49*a*, Stats. 1913, was negligence was not in this case an error prejudicial to plaintiff, it being apparent that, even if the error had not occurred, the jury would have

found, as they did, that the plaintiff was guilty of contributory negligence. *Ludke v. Burck*, 160 Wis. 440, distinguished and limited.

5. The violation of a speed-limit statute, such as sec. 1636—49*a*, Stats. 1913, is not necessarily such gross negligence as renders immaterial the contributory negligence of a person injured by reason of such violation.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

Action to recover for a personal injury.

The issues raised by the pleadings were as to whether defendant was actionably negligent; whether plaintiff failed to exercise ordinary care and thus contributed to produce the injury; the extent of the injury and proper measure of compensation in case of defendant being liable.

There was evidence showing or tending to show, this: The accident occurred May 12, 1913, at about 7:40 o'clock p. m. There was yet sufficient daylight to enable travelers on the street to plainly see each other when they were over 600 feet apart. Plaintiff, a boy about nineteen years of age, in company with three other boys of about the same age, while riding a bicycle on a public street in the city of Appleton, Wisconsin, collided with an automobile, being driven by defendant, and was severely injured. He was traveling on his right-hand side of the street but near the center, approaching an automobile with headlights lit, going in the opposite direction, a little to the driver's right of such center. The street was twenty-seven feet wide between the curbs. For some little time before the accident, a person circumstanced as plaintiff was could readily have seen defendant driving his automobile and approaching the other from the rear. He was driving without the headlights being lit. As he overtook the machine in front of him, he swerved to the left and wholly to his left-hand side of the center of the street in order to pass such machine and then the accident occurred. After defendant so swerved, there remained about seven feet between his

machine and the curb line. For some distance before plaintiff reached the point of collision, he was so blinded by the headlights on the front automobile that he could not see it or defendant's machine. His associates, or some of them, who were nearer their right-hand curb, could see such machine. Defendant did not give any signal of his approach as he swerved to pass the automobile in front of him. He was traveling at a speed of about fifteen, and plaintiff about ten, miles per hour. Just before reaching the vicinity of the automobile the boys had been racing.

The court instructed, on the subject of defendant's conduct, among other things, to the effect that, though he approached the point of collision on his left-hand side of the center of the traveled way when he knew, or in the exercise of ordinary care ought to have known, of the approach of plaintiff on his bicycle and that they would meet at about the place of the collision, and, with reasonable opportunity to do so, he did not seasonably drive his automobile to his right of the middle of the traveled part of the road,—it was for the jury to say, under all the circumstances, whether such failure was negligence on his part; and refused to give a requested instruction to the effect that such failure, under the circumstances suggested, would be negligence as a matter of law and that the jury should find such negligence in answering the question on the subject.

The court was further requested to instruct the jury to the effect that, if defendant, while within 150 feet of, and about to pass, plaintiff was going at a greater speed than ten miles per hour, he was guilty of negligence and the jury should so find. Such request was refused.

The jury found, among other things, as follows: When the accident occurred, plaintiff was ten feet from the curb on his right. Then the space between the two automobiles was six feet. There was sufficient daylight to enable approaching travelers to plainly distinguish each other for a distance of

650 feet. As the parties so approached, plaintiff was traveling ten, and defendant fifteen, miles per hour. For the last seventy-five feet plaintiff was blinded by the automobile headlight. By looking ahead before reaching the point where he was so blinded, he could have seen defendant approaching in the rear of the front automobile in time to have, by the exercise of ordinary care, avoided the collision. Defendant did not fail to exercise ordinary care by reason of his place in the street, nor by his automobile headlights not being lit; but did so fail by not signaling his approach and not seeing the travelers approaching in front of him. Want of ordinary care on plaintiff's part contributed to his injury. Plaintiff was damaged to the extent of $5,000.

On such findings judgment was rendered in favor of the defendant.

For the appellant there was a brief by *F. V. Heinemann* and *Albert H. Krugmeier,* attorneys, and *Greene, Fairchild, North, Parker & McGillan,* of counsel, and oral argument by *Mr. J. H. McGillan* and *Mr. Heinemann.*

For the respondent the cause was submitted on a brief signed by *Lehr & Kiefer,* attorneys, and *J. Elmer Lehr,* of counsel.

MARSHALL, J. The jury having convicted respondent of having been guilty of negligence on the occasion in question, which was the proximate cause of the accident, no prejudicial error was committed unless erroneous instructions were given, or correct ones refused as to whether respondent was guilty of such negligence by reason of having violated sec. 1636—49, Stats. 1911, which required a traveler on the highway with an automobile or other vehicle to observe "the general and usual rules of the road," or because of having violated sec. 1636—49*a,* Stats. 1913, which required a person in driving an automobile upon the highway not to do so at a greater speed than ten miles per hour while within 150 feet

and passing any other automobile or other vehicle going in an opposite direction,—and such error, or errors, may probably have affected the judgment of the jury in respect to the subject of contributory negligence, or such a violation constitutes gross negligence, rendering contributory negligence immaterial.

No error was committed in giving the instruction as to respondent's duty to observe the general and usual rules of the road. Such rules did not absolutely preclude him from reasonably invading his left-hand side of the traveled way in passing the vehicle in front of him. He was required to pass on the left. There was ample opportunity for doing so and yet leave an abundance of room for appellant to pass safely in case of his paying reasonable attention to his movements.

For the respondent to travel at a speed of more than ten miles per hour while within the 150 feet before the collision was in direct violation of the statute and plain error was committed in refusing the instruction to that effect. Such conduct was negligence as a matter of law and the jury should have been instructed accordingly.

Notwithstanding commission of the error indicated, it is considered that appellant was not prejudiced thereby. The jury would doubtless have convicted him of having been guilty of contributory negligence had the error not occurred. They found he had ample opportunity for seeing respondent approaching, long before the headlight on the other automobile interfered therewith and there was plenty of room for him to pass respondent, had he turned toward his right-hand curb. There was a space of ten feet between the point of collision and such curb and seven or eight feet of clear space. The jury found further, in effect, that though appellant ought to have known that respondent was approaching the automobile in front of him and was liable to pass it and turn to the left according to the rules of the road, he went, for the seventy-five feet before the collision, so near the center of the

street as to cause the blinding effect mentioned, when he might have avoided it by turning to his right away from the region of the direct rays of the headlight.

On the whole, the jury had good ground for believing, and probably did believe, that appellant was traveling in a very heedless way when the collision occurred, and that had he paid reasonable attention to his movements, it could easily have been avoided. They practically so found in the finding that "a traveler situated as plaintiff was, by looking ahead a sufficient distance from the place of collision could have observed the defendant's car as it overtook the other car in time to have, by the exercise of ordinary care, avoided the collision." That finding must be viewed, reasonably, in connection with the other findings. So viewed there is no ambiguity about it. It means that, as appellant approached the place of collision, he had a sufficient opportunity, by the exercise of ordinary care, to have observed the approaching automobile and avoided the collision.

It is suggested that the error in failing to instruct the jury properly as to the circumstance of respondent approaching the point of collision at an illegal rate of speed should be held prejudicial to appellant on the subject of contributory negligence, under what was held in *Ludke v. Burck,* 160 Wis. 440, 445, 152 N. W. 190. There the trial court improperly withdrew from the jury the question of defendant's violation of the statute as to speed limit and, on that account, granted a new trial, notwithstanding the plaintiff was found guilty of contributory negligence. In sustaining that this court said that it was apparent the jury were probably misled by the withdrawal of the questions and deprived of the benefit of the evidence of violation of the statute in considering the subject of contributory negligence. That was said in respect to the facts of the particular case,—not as a rule that, in any case where the matter is material a failure to properly instruct the jury that violation of a safety statute is negligence as a matter of law, will so affect the subject of contributory negli-

gence as to require a new trial in case of the finding by the jury in respect thereto being unfavorable to the defendant. In our judgment, in view of the facts here, it is not clear that had the error not occurred, the result might probably have been favorable to appellant as to his contributory negligence. This case is widely distinguishable from the *Ludke Case* and it is considered that the logic of such case does not govern. There the questions as to speed limit were submitted and, after the jury had deliberated over twenty-four hours without making much progress the court withdrew them. It was because thereof and the general course of the trial that this court reached the conclusion to which we have alluded.

The question of whether respondent's violation of the statute was, as matter of course, gross negligence, rendering contributory negligence of plaintiff immaterial to his right to recover, under the doctrine of *Pizzo v. Wiemann,* 149 Wis. 235, 134 N. W. 899, is ruled in the negative by *Ludke v. Burck,* 160 Wis. 440, 152 N. W. 190, for the reasons therein stated. The court there declined to extend the rule of the *Pizzo Case* to violations of speed-limit statutes such as the one involved here.

By the Court.—The judgment is affirmed.

ORMOND, Respondent, vs. MCKINLEY, Appellant.

April 12—May 2, 1916.

Mutual benefit societies: Change of beneficiary.

Under sec. 1955c, Stats. 1898 (sub. 5, sec. 1957, Stats. 1915), a member of a mutual benefit society may change the beneficiary named in his certificate or policy without the consent of such beneficiary, by complying with the by-laws of the society.

APPEAL from an order of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

The action is brought to determine the right to the proceeds of a benefit certificate issued by the Modern Woodmen of America.

In September, 1905, William J. Ormond joined the Modern Woodmen of America, a fraternal benefit society, and the society issued a certificate of insurance to him for $1,000. Ormond named his wife, *Nellie,* the defendant, now *Mrs. McKinley,* the beneficiary in this certificate. In 1909 the defendant, as the wife of William J. Ormond, instituted divorce proceedings and secured a divorce from him. In these proceedings the court did not consider or render any order or judgment in reference to this insurance. Ormond thereafter married his second wife, the plaintiff, *Laura Ormond.* In December, 1910, Ormond had the certificate of insurance changed, making his second wife, *Laura Ormond,* the beneficiary in place of his divorced wife, *Nellie.* This was done without the knowledge or consent of the first wife, and she at no time waived, surrendered, assigned, or gave up any right or interest in the certificate. In 1915 Ormond died, and both the defendant, his first wife, and the plaintiff, his second wife, claim the proceeds of the certificate. The insurance company paid the money into court and was released, and this action is prosecuted to determine to whom the money belongs.

The plaintiff demurred to the answer and to the cross-complaint of the defendant and the court made an order sustaining each of these demurrers. It is from such order that this appeal is taken.

For the appellant the cause was submitted on the briefs of *Otjen & Otjen.*

For the respondent there was a brief by *Hougen & Brady,* and oral argument by *Charles E. Brady.*

SIEBECKER, J. The rights of the parties to the proceeds of the benefit certificate are controlled by the statute, sec. 1955*c,* Stats. 1898, which provides:

"Any member of such society, order or association may

name as his beneficiary any person having an insurable interest in his life or make his insurance payable to his estate, *and may change the beneficiary named in his certificate or policy without the consent of such beneficiary by complying with the by-laws of the corporation which issued the same.*"

The conditions of these provisions of the statute are material in showing the rights of the parties to the proceeds of the certificate. As declared in the *Rawson Case* [*Rawson v. Milwaukee Mut. L. Ins. Co.*] 115 Wis. 641, 92 N. W. 378, the beneficiary's right or interest under such a certificate ". . . was subject to defeat at any moment during the life of the member by his act without her consent. It did not become absolute and indefeasible until the death of the member without having exercised anew his power of appointment." Under familiar rules the provisions of the foregoing statute are a part of the terms of the certificate, and all persons who acquire any rights or interest in it receive them subject to the conditions imposed by this law. It is obvious that the legislature of 1898 intended the provisions of this statute to apply generally to all mutual benefit and fraternal societies by omitting the limitation of the prior statute confining it to those "organized in Wisconsin" and inserting the word "such" before the words "society, order or association," thus referring to the class designated under the title of which sec. 1955*c* is a part, namely, "Mutual beneficiary and fraternal organizations, societies, orders and associations." The case of *Raschke v. Haderer,* 138 Wis. 129, 119 N. W. 812, declared it as the right of members of such societies to make a change of beneficiaries without the consent of the beneficiary named therein by complying with the regulations of the society. It is clear that William J. Ormond as a member of the order had the right to designate the plaintiff as beneficiary in place of the defendant and that the defendant has no right to nor interest in the proceeds of the certificate here involved. The circuit court properly sustained the demurrers to the answer.

By the Court.—The order appealed from is affirmed.

MASBRUCH, Respondent, vs. VON OEHSEN and others, Appellants.

April 12—May 2, 1916.

Religious societies: Interference with member's rights: Personal wrong of trustees: Injunction: Parties: Jurisdiction of civil courts.

1. In an action to restrain trustees of a religious society from interfering with the exercise by plaintiff of his rights as a member of the corporation, a complaint alleging that defendants acted unlawfully, beyond the scope of their authority as trustees, and contrary to the constitution, by-laws, and ordinances of the corporation, in causing plaintiff's name to be stricken from the church roll and in denying to him his rights as a member of the corporation, to which he had always paid his dues and contributed large sums of money, and that their acts were neither authorized nor assented to by the corporation, shows that such acts were the personal tort of the defendants; and the corporation itself, though a proper party defendant, is not a necessary party.
2. Upon the facts so alleged the action does not involve an interference with church faith, doctrine, or discipline, nor the review of any action of the corporation through its officers, but is based on an unlawful interference with civil rights secured to the plaintiff by the constitution and by-laws of the corporation, which wrong the civil courts have jurisdiction to prevent or redress.

APPEAL from an order of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

This action was brought to restrain the defendants, trustees of an incorporated church bearing the title of Evangelische-Lutherischen Friedens Gemeinde zu Platteville, Wisconsin, also known and described as Die Corporation der Deutschen Evangelische-Lutherischen Friedens Kirche zu Platteville, Wisconsin, from interfering with the plaintiff in the exercise of his rights of membership in that corporation by virtue of a resolution or order of the defendants directing the secretary of the corporation to strike his name from the roll of members, and from preventing him from taking part as a member of the corporation in the meeting of the members, and from

interfering with or preventing plaintiff from exercising and using the rights and privileges belonging to him as a member.

The complaint alleges, among other things, that the defendants were trustees of a religious corporation organized under the laws of the state of Wisconsin; that said corporation was duly perfected as a corporation for religious purposes under the statutes of Wisconsin and had existed for more than twenty years immediately preceding the commencement of this action, and maintained a church and school at the city of Platteville in Grant county, Wisconsin; that for the conducting of the business of the corporation the articles of organization provided that a board of trustees composed of six persons should be elected, whose chairman should be the permanent minister, who in case of a tie should cast the deciding vote, and that two of the trustees should be elected to the office of church elders; that the articles of organization also provided that in accordance with the laws of Wisconsin the trustees should hold office for three years, and further provided that the organization should have the right through the trustees to buy and to sell, to receive gifts and bequests, and to sue and be sued, and that religious services shall be held in the German language as long as five members of the organization desire it; that the corporation adopted certain by-laws and ordinances which have been in force for many years and are still in force, under which the temporal affairs of said corporation are administered and the services in said church are conducted, and prescribing the duties and rights of members and officers and the method of admitting persons to membership in said organization and the method of suspending and expelling members from said organization.

Other provisions of the by-laws and ordinances are set forth in the complaint.

The complaint further alleges that said church ordinances provide a method of excluding members who have failed to observe the provisions of the church ordinances, but provide for a hearing before the organization and the decision of the

organization in a meeting of the members; that neither by the articles of organization, by-laws, or ordinances is any other method provided for the excluding or expelling of a member from said organization or corporation; and that neither the articles of organization, by-laws, or ordinances of said corporation give to or confer upon the board of directors or any officer or member thereof, or any other person, or any board or committee, power or authority to exclude a member or to strike his name from the list of members, or to exclude a member of said corporation from any right, privilege, or prerogative which such membership confers or secures.

It is further alleged in the complaint that exclusion or expulsion of a member of said corporation under the by-laws and ordinances deprives him of all rights and privileges as a member of said corporation and deprives him and his family of the right to participate in the ceremonies and services of said church, and among other privileges deprives him of the right to send his children to the school conducted by said organization, and of the privilege of burial from the church of said organization, and from the right to receive spiritual services of the resident pastor of the church, and from obtaining the services of said pastor in cases of baptism, confirmation, communion, marriage, sickness, and death; that during all the years of its existence said organization has been and is an independent organization and church, not subject to or subordinate to any other church or religious body; that for several years immediately preceding the commencement of this action plaintiff has been a member of said organization in good standing and has contributed a considerable sum of money for the support of said corporation; that on the 5th day of July, 1914, the defendants, trustees of said corporation, without cause and unlawfully, caused and directed the secretary of said board of trustees to strike the name of this plaintiff from the roll of members of said corporation, and said secretary did strike plaintiff's name from the roll of members,

and said trustees have ever since refused to restore his name to the roll of members and refuse to permit plaintiff to exercise the rights and privileges of a member of said corporation, as a result of which plaintiff has been and is deprived of all rights and privileges as a member; that plaintiff's name was stricken from the rolls without notice and without his knowledge or consent, and that said acts of defendants were not done in pursuance of any action or order of the members of said corporation, and were contrary to the articles of organization of said corporation and not authorized by any provision of the by-laws or ordinances.

The prayer is that the defendants be restrained and enjoined from excluding or attempting to exclude the plaintiff's name from the roll of members of said corporation, and from preventing plaintiff from taking part as a member in the meetings, and from interfering with or preventing plaintiff from exercising the rights which lawfully belong to him as a member, and for general relief.

The defendants demurred to the complaint on the grounds: (1) want of facts sufficient to constitute a cause of action; (2) that the court had no jurisdiction of the person of the defendants; (3) the court had no jurisdiction of the subject of the action; (4) defect of parties by reason of omission of the corporation as a defendant.

The demurrer was overruled with leave to answer upon payment of $10 terms. From the order overruling the demurrer this appeal was taken.

For the appellants there were briefs by *Kopp & Brunckhorst,* and oral argument by *L. A. Brunckhorst* and *A. W. Kopp.* To the point that membership in a church involves no civil or property right which will give the civil courts jurisdiction to review the action of the church authorities, they cited *Hatfield v. DeLong,* 156 Ind. 207, 59 N. E. 483, 51 L. R. A. 751; *Waller v. Howell,* 20 Misc. 236, 45 N. Y. Supp. 790; *Pinke v. Bornhold,* 8 Ont. L. Rep. 575; *Sale v.*

First Regular Baptist Church, 62 Iowa, 26, 17 N. W. 143; also cases cited in notes to 36 L. R. A. N. S. 947

J. W. Murphy, for the respondent.

KERWIN, J. The defendants are trustees of a corporation organized under the laws of the state of Wisconsin. The corporation was a proper party defendant in the instant suit, but under the allegations of the complaint it was not a necessary party.

The allegations of the complaint negative the idea that the defendants were acting within the scope of their authority as trustees when they struck plaintiff's name from the church roll and denied him his rights and privileges as a member of the corporation. The complaint shows that the acts of the defendants were neither authorized nor assented to by the corporation, but were without authority and contrary to the constitution, by-laws, and ordinances of the corporation. Under such circumstances the acts of the trustees were their wrong, their personal tort, and not the wrong or tort of the corporation.

The allegations of the complaint show that the plaintiff has never been excluded from the corporation, and that all the acts and doings of the defendants in striking his name from the roll and denying him his rights and privileges as a member of the corporation are without authority and unlawful; that the corporation never authorized, ratified, or assented to the acts of the defendants; that plaintiff is still a member of said corporation in good standing; that plaintiff has contributed large amounts of money to said corporation and has always paid his dues; that since defendants struck plaintiff's name from the roll of members of the corporation they have refused and still refuse to permit plaintiff to exercise the rights or privileges of a member of the corporation, and refuse to permit him to take part as a member in meetings of

the members of the corporation and threaten to refuse to recognize him as such member in the future.

It is contended by appellants that the court has no jurisdiction of the person or subject matter and that the complaint does not state facts sufficient to constitute a cause of action.

Under this head it is insisted that the case made involves matter of church doctrine and discipline and is beyond the jurisdiction of civil courts. The rule contended for by appellants and to which many authorities are cited, is stated in 24 Am. & Eng. Ency. of Law (2d ed.) 348, thus:

"The ecclesiastical courts have exclusive jurisdiction in matters of church government, church organization, religious tenets, the laws of religious adjudications, and all other matter pertaining solely to the church as such: with these the civil courts cannot interfere. The jurisdiction of the civil courts to interfere with ecclesiastical controversies is limited to those cases in which the rights of property or civil rights are involved."

The cases cited by appellants' counsel do not reach the instant case. Here it is not a question of attempted interference with church faith, doctrine, or discipline, nor review of any action of the corporation through its officers. Under the allegations of the complaint the civil rights of the plaintiff secured to him by the constitution and by-laws of the corporation have been unlawfully interfered with to his injury by the defendants.

The civil courts have jurisdiction to redress such wrongs, even though done by the corporation. *West Koshkonong Cong. v. Ottesen,* 80 Wis. 62, 49 N. W. 24; *State ex rel. Cuppel v. Milwaukee Chamber of Commerce,* 47 Wis. 670, 3 N. W. 760; *Hellstern v. Katzer,* 103 Wis. 391, 79 N. W. 429; *Marien v. Evangelical Creed Cong.* 132 Wis. 650, 113 N. W. 66; *State ex rel. Weingart v. Board, etc.* 144 Wis. 516, 129 N. W. 630.

In the instant case, however, no claim is made against the corporation. The allegations of the complaint are to the effect that the acts of the defendants were not the acts of the corporation, but the unauthorized and unlawful acts of the defendants, and were null and void. We are convinced that the complaint states a good cause of action against the defendants and that the corporation is not a necessary party defendant.

By the Court.—The order is affirmed.

KLAR PIQUETT MINING COMPANY, Appellant, vs. TOWN OF PLATTEVILLE, Respondent.

April 12—May 2, 1916.

Klar Piquett M. Co. v. Platteville, post, p. 215, followed.

APPEAL from an order of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

J. W. Murphy, for the appellant.

For the respondent there was a brief by *Kopp & Brunckhorst,* and oral argument by *A. W. Kopp.*

VINJE, J. This is an action to recover an alleged excess of income tax paid for the year 1911. Except as to dates and amounts it is identical with the case following and is ruled by it.

By the Court.—Order affirmed.

KLAR PIQUETT MINING COMPANY, Appellant, vs. TOWN OF PLATTEVILLE, Respondent.

April 12—May 2, 1916.

Taxation of incomes: Lessee of mine paying royalty: Deduction for ore depletion.

In making a return for income taxation the lessee of a mine on a royalty basis is not entitled to make any deduction for ore depletion in addition to the sum paid as royalty. Even if the lease or right to mine is perpetual it is not, for purposes of income taxation, equivalent to ownership.

APPEAL from an order of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

Action brought under sec. 1164, Stats. 1913, as amended by ch. 478 of the Laws of 1913.

Plaintiff, a mining corporation operating under a lease, made its income return for the year 1912 showing a gross income of $148,665.42. Among other deductions it claimed $65,000 for depreciation on ore body. The state tax commission changed such amount from $65,000 to nothing and assessed an income tax of $3,861.74 more than the return of plaintiff showed the tax to be. The excess was paid under protest, a claim filed with the town which was disallowed, and this action was brought to recover the alleged illegal tax. These and other facts appearing by the complaint, the defendant demurred on the ground that the complaint failed to state a cause of action. The demurrer was sustained and plaintiff appealed.

J. W. Murphy, for the appellant.

For the respondent there was a brief by *Kopp & Brunckhorst,* and oral argument by *A. W. Kopp.*

VINJE, J. The record shows that $16,173.58 for royalties, $5,000 for depreciation on equipment or plant, in addi-

tion to the customary deductions, were claimed and allowed. The claim of $65,000 depreciation on ore body was made solely on account of the depreciation of the mine by reason of the diminished quantity of ore in it after the mining operations of the year. The complaint is silent as to the duration and terms of the lease. It appears from the return, however, that a royalty was paid, presumably so much per ton. It may be assumed that plaintiff's right to mine, barring breaches of the lease, is perpetual, or endures as long as there is merchantable ore which it pays to mine. So the appeal presents the question whether the lessee of a mine paying a royalty is entitled to deduct for ore depreciation in addition to the sum paid as royalty.

Plaintiff argues that its interest in the lease is equivalent to ownership and that owners of mines are entitled to a deduction for ore depreciation, citing *U. S. v. Nipissing M. Co.* 202 Fed. 803, and *Von Baumbach v. Sargent L. Co.* 219 Fed. 31. The first case sustains the proposition to which it is cited. The last is clearly not in point, for the defendant company was a holding company organized for the purpose of collecting claims, turning the property into cash, and distributing the moneys so obtained among its stockholders. It engaged in no mining, trading, or other like business. The defendant relies upon *Van Dyke v. Milwaukee,* 159 Wis. 460, 150 N. W. 509; *Stratton's Independence v. Howbert,* 231 U. S. 399, 413, 34 Sup. Ct. 136; *Alianza Co. v. Bell,* [1904] 2 K. B. 666; *Coltness I. Co. v. Black,* L. R. 6 App. Cas. 315; *Comm. v. Penn G. C. Co.* 62 Pa. St. 241; and *Comm. v. Ocean O. Co.* 59 Pa. St. 61.

The complaint does not set out the lease with sufficient fulness to warrant any expression of opinion as to the soundness of plaintiff's claim based upon rights equivalent to ownership. Nor is it necessary to express any opinion upon it so far as the merits of this case are concerned. For, however equivalent to ownership its leasehold interest is for general purposes,

it is not equivalent to ownership for purposes of income taxation. A mining company operating under a lease pays a certain sum for every ton taken out, whether such sum is stipulated in the lease or not. If it is stipulated, then it is or amounts to a royalty of so much per ton. If the lease provides for a gross sum for a given time, the amount per ton is easily ascertainable by dividing such sum by the number of tons taken out in the specified time. In other words, the lessee of a mine pays so much per unit of measurement for ore taken out of the mine, which amount is always ascertainable at the end of the period fixed upon in the lease. In the case of a gross sum paid in advance for a perpetual lease there might be considerable difficulty in determining the annual amount that should be allowed for ore mined. But we have not such a case before us. In the present case a specific sum was paid as royalty for the year and such sum was deducted from the gross proceeds of the business. By such deduction plaintiff was allowed the cost of the ore mined by it. The allowance of such cost is all the deduction it is entitled to in respect to ore. The mining of ore is equivalent to a manufacturing process in which the ore in place constitutes raw material used. *Stratton's Independence v. Howbert,* 231 U. S. 399, 34 Sup. Ct. 136. There is no more reason for allowing a lessee of a mine upon a royalty basis any deduction for depletion of ore in addition to the royalty paid than there would be to allow a manufacturer of lumber who has the right to cut and remove all the timber upon a certain section of land at so much per thousand feet a deduction, in addition to the price per thousand paid, for depletion of timber after one year's cut. Each has a right to take all there is at a certain price per unit of measurement. Each is engaged in a manufacturing process using raw material. Each is entitled to deduct the cost of such material used as a part of the cost of the manufacturing process. The fact that an unascertained quantity is bought does not entitle them to a deduction for de-

pletion any more than when a specified quantity is bought. Neither does the fact that ore is taken from under the surface of the earth change the situation. There would be just as much reason to claim a depletion for ore, in addition to cost, in the case of a manufacturing concern that has purchased a dump pile of a thousand tons at so much per ton, and has used but half of it during the tax year. It can claim with just as much truth that there is one ton less of ore in the pile after one ton is taken away as can the lessee of a mine that the quantity of ore therein is depleted one ton for every ton taken out. Both are correct as to the fact of depletion. But they are not damaged by the depletion beyond the price paid, any more than a miller is damaged by the depletion of wheat in his bin caused by his grinding it into flour. The price paid by the lessee of a mine for ore taken out measures the cost of the raw material to him in the form in which he takes it. To this, of course, must be added the cost of mining and marketing, including depreciation to plant and other proper expense connected with the business, to arrive at the total cost thereof. When such total cost has been allowed him he has been allowed all the cost he has incurred.

The claim that he is entitled to the benefit of an advantageous purchase and should be allowed as cost the reasonable value of the material used instead of its purchase price, if carried out to its logical consequences would deprive business of its chief element of profit; make the income tax law unworkable, and leave but the dregs of an income tax from business enterprises. The trial court properly sustained the demurrer to the complaint.

By the Court.—Order affirmed.

JOHNS and another, Appellants, vs. CITY OF PLATTEVILLE, Respondent.

April 13—May 2, 1916.

Municipal corporations: Sewerage system: Nuisance: Fouling of watercourse: Rights of riparian owners.

1. **Legislative authority to install a sewerage system gives a city no right to create or maintain a nuisance, whether such nuisance results from negligence or from the plan adopted.**
2. **A city has no right to discharge sewage into a watercourse in such a way as to infringe upon the rights of riparian owners to the natural flow of water substantially unimpaired in volume and purity.**
3. **Findings by the trial court in this case, to the effect that the defendant city properly treated and purified its sewage in septic tanks and that the effluent did not render the waters of the creek in question, which flowed over plaintiffs' land, foul, contaminated, impure, or unfit to be drunk by domestic animals, and hence that there was no nuisance, are *held* to be contrary to the great preponderance of the evidence.**

APPEAL from a judgment of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

Action for damages to enjoin the maintenance of a nuisance. The facts are: The defendant city disposes of its sewage by treating the same in septic tanks. Tank number one is located some distance from plaintiffs' land, and the water discharged from the tank, referred to as the effluent, is conducted through a pipe to a point on the public highway near plaintiffs' property and there discharged into Rountree branch, a small creek which flows southerly from the place of discharge over the plaintiffs' land. Plaintiffs claim that the discharge from the tank renders the waters of the stream foul, contaminated, impure, poisonous, not fit for domestic use or to be drunk by animals of any kind; that the deposit from the tank gives rise to noxious, unwholesome, poisonous smells and stenches, causing great annoyance and discomfort to plaintiffs and their families. Plaintiffs ask that the discharge of sew-

age in the manner alleged be declared to be a public nuisance and that it be declared to be a private nuisance and for damages and that the nuisance may be abated. The answer of the defendant city denies the principal allegations of plaintiffs' complaint, alleges that the effluent is not impure and that the stream is not contaminated and that no nuisance exists. The cause was tried before the court without a jury, and the court found upon all the issues in favor of the defendant and gave judgment directing that plaintiffs' complaint be dismissed, and from the judgment so entered plaintiffs appeal.

Calvert Spensley, for the appellants.

R. A. Goodell, attorney, and *J. W. Murphy,* of counsel, for the respondent.

ROSENBERRY, J. The sole question presented by this appeal is whether or not the evidence sustains the findings of the trial court. The law upon the right of a municipality to discharge sewage into a watercourse to the detriment of the lower riparian owner is fully stated in the case of *Winchell v. Waukesha,* 110 Wis. 101, 108, 85 N. W. 668, where the court said:

"The right of the riparian owner to the natural flow of water substantially unimpaired in volume and purity is one of great value, and which the law nowhere has more persistently recognized and jealously protected than in Wisconsin. Not alone the strictly private right, but important public interests, would be seriously jeopardized by promiscuous pollution of our streams and lakes. Considerations of æsthetic attractiveness, industrial utility, and public health and comfort are involved. . . . The great weight of authority, American and English, supports the view that legislative authority to install a sewer system carries no implication of authority to create or maintain a nuisance, and that it matters not whether such nuisance results from negligence or from the plan adopted. If such nuisance be created, the same remedies may be invoked as if the proprietor were an individual."

The court found that the system adopted by the defendant city for the disposition of its sewage was one properly adapted

to that purpose; that it was properly designed and constructed and was adequate to take care of and purify the sewage passing through the sewer pipes of the sewerage district connected with the tank in question; and the court further found that the tank in question properly digested and rendered harmless the sewage; that the defendant had not during the time complained of permitted any imperfectly digested sewage to pass through the pipe; that no sewage had impregnated the air over and upon plaintiffs' land or upon the lands in the vicinity thereof with unwholesome, injurious, or poisonous smells or fumes, and that the sewage was properly purified; that no material or substantial part of the sewage passed into the waters of the branch in question so as to render such water foul, contaminated, impure, or unfit to be drunk by domestic animals. From the findings of the court there followed the necessary conclusion that no nuisance existed.

From the testimony it appears that the tank in question was constructed in 1907 easterly from the point where it is now discharged into Rountree branch several hundred feet; that at the time of its erection a pipe extended from the tank directly into Rountree branch; that in the year 1911 one Caroline Stender, an upper riparian owner, complained of the condition of the stream and brought suit against the defendant city asking to have the tank declared a nuisance both as to herself and as to the public. This suit was settled by an agreement under which the city paid a sum of money and constructed a pipe across the lands of Caroline Stender and several hundred feet down stream to the point where the effluent is now discharged.

It further appears from the testimony of Mr. Tully, an expert, that the sewage is treated solely by the action of bacteria. The sewage is first discharged into the septic tank, where it is attacked by a specific type of bacteria which causes its liquefaction. The bacteria grow and cultivate without oxygen, and in their endeavor to obtain energy for their activi-

ties they decompose the sludge or solid matter which is on the bottom of the tank and liquefy it into decomposition products, one of the characteristics of the products being their solubility, so that the entire sewage matter coming into the tank is discharged into the stream, with the exception of a comparatively small amount of solid matter which is insoluble and which is deposited mainly upon the floor of the tank and hauled away from time to time. If, however, the quantity of sewage is too large or the contents of the tank are stirred up, a certain amount of undigested sludge or solid matter will be carried off; that "it is inevitable that some finely divided suspended material must be discharged from every septic tank which is properly working." The main question litigated upon the trial was whether or not there was such a quantity of this undigested sewage discharged into Rountree branch and carried thence upon the lands of plaintiffs as would constitute a nuisance. The testimony of the plaintiffs' witnesses was to the effect that the water discharged from the pipe near the bridge was dark, looked black, smelled very bad, was stringy and dirty, and was unfit for domestic animals to drink; that the smell from the tank was offensive, the water was thick, and that it was so offensive at one time that men washing slag in the stream about 100 feet below were sick to their stomachs and could not eat, they were unable to stand the smell until cooler weather; that persons passing over the bridge noticed the odor, and that it was very bad excepting in wintertime or cool weather. The road overseer testified that he had observed the discharge from the pipe; that it was dark, slimy and offensive, and was discolored; that in 1913, while working on the bridge, a rail was dropped into the water and when removed one could hardly touch it, that it smelled and the hands and clothing smelled after coming in contact with it. Another witness testified that he got some water out of the creek to throw over his hogs; that from the half pail of water he got he could smell it all the way to town; that the odors were very offensive in warm weather. Without further

reviewing the evidence, plaintiffs' witnesses testified very fully to the facts stated.

The defendant produced two witnesses who own land adjoining the stream below the *Johns* lands. These witnesses testified that they had no trouble upon their premises; that there was no odor, and that they had not noticed that the water was contaminated. It appeared, however, that before the stream reached their premises its volume was nearly doubled by water flowing from a spring. The third witness produced for the defendant testified as to the amount of damages, but did not deny the testimony offered on behalf of the plaintiffs as to the character of the discharge below the mouth of the pipe, except to say that he had never noticed any smell from the Rountree branch on the *Johns* or Carthew lands.

The trial court apparently adopted the findings of Mr. Tully, the expert, *in toto,* giving little or no weight or effect to the testimony of the plaintiffs' witnesses. We have carefully examined the evidence given by Mr. Tully, and from such examination we are of the opinion that it does not in any material aspect of the case contradict the testimony of plaintiffs' witnesses, and, unless it does so, their testimony stands practically uncontradicted in the case. Mr. Tully was a fair, frank witness. He examined the stream on two different occasions, once between the 9th and the 14th of October, 1914, and the second time in the month of November, 1914, at or shortly before the time of the trial. He does not say or pretend to say what the condition of the stream was during the summer months, and bases his conclusions entirely upon a bacteriological examination of the effluent and the water found in the stream upon the occasion of his visits to the stream at the times stated. He testified that it is practically impossible to have a septic tank and thus to purify sewage without having a stream somewhat polluted where the septic tank enters into it; by pollution, meaning bacterial pollution. He was asked this question: "From what you have determined of the character of the water, was it water that cattle

could drink, as it ran through *Mr. Johns's* land, without injury?" And he answered: "I should not think that a more or less continuous use of the water for the purpose of watering cattle would be specifically injurious." He further stated that he would object to the use of milk from such cattle unless he knew that the teats and bags of the animals had been thoroughly cleaned; that the use of any stream which is polluted to any considerable degree is to be deprecated for the use of cattle.

From Mr. Tully's testimony it appears that the discharge of sewage into a stream may result in the production of a nuisance principally in three ways; these may appear separately or may be in combination: (1) The mingling of undigested sewage with the waters of the stream; (2) the deposit of undigested sewage on the bed and banks of the stream; (3) bacterial pollution.

In order to properly dispose of the sewage it appears that two factors must combine. There must be a septic tank of sufficient capacity to permit the completion of the bacteriological process before the sewage effluent passes over the weir of the tank and into the discharge pipe; and second, the process must be properly carried on, that is, the tank must not be overloaded, the tank contents must not be stirred up. It further appeared that, in addition to the methods provided for the discharge of the sewage from one compartment to another in the tank, holes had been cut leading from one compartment to another so that more sewage could be passed through the tank and its capacity thereby increased. The conditions described by plaintiffs' witnesses may be the result of crowding the tank beyond its capacity; may be due to the fact that the holes cut leading from one compartment to another permit the passage of undigested matter.

Mr. Tully testified very fully as to the results of the examination made by him from the samples of water taken. But from this testimony it appears that they were satisfactory from a bacteriological standpoint as of the date when the

samples were taken. There is not a syllable of testimony in the case to show that the effluent was in the same condition at the times referred to by plaintiffs' witnesses as at the time of the taking of the samples. Mr. Tully testified that at the time of his inspection there were no deposits of objectionable character on the bed or banks of the stream. There was no testimony offered by the defendant tending to show a regularity of sewage flow. Mr. Tully based his observations in that respect wholly upon an estimate. There was testimony on the part of the plaintiffs tending to show that a very much larger amount of water was used during the warm summer months than at other times. While there is some testimony on the part of the plaintiffs tending to show that the condition was bad continuously, it is undisputed that it was much worse in the summer months than at other times. It seems remarkable, if the fact is as claimed by the defendant that no nuisance exists, that no witnesses were produced by the defendant to prove the actual state of the stream at the times especially complained of, instead of relying entirely upon a scientific examination of samples taken in the months of October and November, to establish by inference the condition of the stream some months and years prior thereto.

Giving to the testimony of Mr. Tully all the force and effect that can fairly be claimed for it, it does not fairly contradict the testimony of plaintiffs' witnesses, for the testimony of both may be entirely true. Assuming the testimony of plaintiffs' witnesses to be true, as we are bound to do, it being practically uncontradicted in the case, the findings of the trial court are manifestly against the great preponderance of the evidence and the plaintiffs are entitled to the relief prayed for in the complaint.

By the Court.—Judgment reversed, and cause remanded for further proceedings in accordance with this opinion, the circuit court to assess damages upon this record or take further testimony upon that point, as it may determine.

CARTHEW, Appellant, vs. CITY OF PLATTEVILLE, Respondent.

April 13—May 2, 1916.

Johns v. Platteville, ante, p. 219, followed.

APPEAL from a judgment of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

Calvert Spensley, for the appellant.

R. A. Goodell, attorney, and *J. W. Murphy,* of counsel, for the respondent.

ROSENBERRY, J. The issues in this case are the same as those in the case of *Johns v. Platteville, ante,* p. 219, 157 N. W. 761, and this case is controlled by the decision in that case, and the mandate will therefore be the same.

By the Court.—Judgment reversed, and cause remanded for further proceedings in accordance with the opinion in *Johns v. Platteville,* the circuit court to assess damages upon this record or take further testimony upon that point, as it may determine.

BECKER, Appellant, vs. JONES and others, Town Supervisors, Respondents.

April 13—May 2, 1916.

Highways: Laying out: Appeal, when to be taken: "Determination:" Notice of time, etc., for appointment of commissioners: Service: Jurisdiction of justice.

1. In sec. 1276, Stats. 1913, providing that any person aggrieved by an order of town supervisors laying out a highway "may, within thirty days after such determination, appeal therefrom," the word "determination" refers to the filing of the written order in the town clerk's office, as required by sec. 1269, and not to the oral or mental decision of the supervisors.

2. Upon such an appeal a failure to serve notice of the time and place for the appointment of commissioners upon at least two of the supervisors six days before such time, as required by sec. 1277, Stats. 1913, deprived the justice of jurisdiction of the subject matter; and such want of jurisdiction was not cured by subsequent voluntary appearance of the supervisors before the justice.

APPEAL from a judgment of the circuit court for Monroe county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

This is an action in equity by the plaintiff to enjoin the defendant supervisors from entering on his farm and constructing a highway across it.

The facts are that the defendant supervisors upon due petition met May 12, 1914, and decided to lay out the highway. They filed the formal order laying the highway and awarding damages May 18th. Plaintiff on June 16th filed with the proper justice of the peace an application for an appeal pursuant to sec. 1276, Stats. 1913, which requires that the application be made within thirty days after the "determination" of the supervisors. The justice of the peace made out a notice as required by sec. 1277, Stats. 1913, to the effect that commissioners would be appointed on June 24th. This notice was served on one of the supervisors personally on June 17th and upon the other two by mailing, one copy being mailed June 17th and the other June 18th. One of the copies so mailed was received June 19th and there is no evidence as to the receipt of the other. On the 24th day of June the supervisors appeared before the justice and objected to the appointment of commissioners on the ground of lack of jurisdiction because the appeal was not taken within thirty days after the "determination" of the supervisors as prescribed by sec. 1276, *supra,* and because the notice to the supervisors was not served upon two of them six days before the appointment of the commissioners as required by sec. 1277, *supra.* The objection was overruled and the supervisors thereafter participated in the selection of commissioners. The commissioners so appointed afterwards met and reversed the order of the

supervisors laying the road. On appeal from this decision to commissioners appointed by the county judge the reversal was affirmed. The supervisors now claim that the justice of the peace had no jurisdiction and hence that their order laying out the highway still stands unreversed. The plaintiff admits that notice of the appointment of commissioners was not given by the justice of the peace as required by sec. 1277, *supra,* but insists that this objection as well as all other objections were waived by the voluntary participation of the supervisors in the proceedings after their objection to the jurisdiction of the justice had been overruled.

The circuit court on these facts held that the justice had no jurisdiction because of failure to give the statutory notice of the appointment of commissioners and hence that the *locus in quo* was a public highway, and the plaintiff appeals.

For the appellant there was a brief by *W. F. & A. C. Wolfe,* and oral argument by *Lucien T. Reed.*

Thorwald P. Abel, for the respondents.

WINSLOW, C. J. In this case it is held:

1. Sec. 1276, Stats. 1913, relating to an appeal by any aggrieved person from the decision of the supervisors laying out a highway, provides that such person may, "within thirty days after such determination, appeal therefrom." The word "determination" as here used refers to the filing of the written order in the town clerk's office, as required by sec. 1269, Stats. 1913, and not to the oral or mental decision of the supervisors; hence the appeal to the justice of the peace was properly taken.

2. The failure to serve notice upon at least two of the supervisors of the time and place for the appointment of commissioners six days before such appointment, as required by sec. 1277, Stats. 1913, deprived the justice of jurisdiction of the subject matter, and this was not cured by the subsequent

voluntary appearance of the supervisors before the justice. *Burns v. Spring Green,* 56 Wis. 239, 14 N. W. 72; *State ex rel. Milliren v. Varnum,* 81 Wis. 593, 51 N. W. 958. It follows that the order of the supervisors laying out the highway is unreversed, and that the complaint was properly dismissed.

By the Court.—Judgment affirmed.

MOSSRUD, Respondent, vs. LEE, Appellant.

April 13—May 2, 1916.

Negligence: Sale of poisonous liquid: Labeling: Violation of statute: Death of live stock: Proximate cause: Contributory negligence: Questions for jury.

1. The sale of a poisonous liquid "quack grass destroyer" without proper label and without the purchaser being made aware of its dangerous character, in violation of sub. 5, (a), sec. 1419, Stats. 1913, was negligence *per se.*
2. In an action for the value of cows which died as a result of eating grass on which such poisonous liquid had been applied, it being undisputed that plaintiff and his son had made three separate purchases of the liquid from defendant, that on the last occasion it was not labeled as the law required, and that the liquid then purchased had been applied to the grass which the cows ate, it was not error to confine the jury, in answering the question of defendant's negligence, to the facts in respect to the last sale,—the jury being free to consider, in answering a separate question as to whether negligence in that sale was the proximate cause of the death of the cows, all the evidence in the case, including that which tended to show that plaintiff knew from the circumstances of the first and second purchases and from the effect of the liquid on quack grass that it was dangerous to permit cattle to eat grass which had recently been treated therewith.
3. Findings by the jury in such case that defendant's negligence in respect to the last sale of the liquid was the proximate cause of the death of the cows, and that plaintiff was not guilty of contributory negligence, are *held* to be sustained by the evidence.

APPEAL from a judgment of the circuit court for Vernon county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

Action to recover for some cows, claimed to have been fatally poisoned by negligence of defendant.

The pleadings presented for trial the question of whether defendant was negligent to plaintiff's damage, the amount of the damage, and whether he was guilty of contributory negligence in respect to the matter.

Plaintiff was a farmer. In June, 1913, he purchased of defendant, a dealer in farm supplies, a jug of liquid called "Quack Grass Destroyer" for use in killing quack grass on his place. The jug was filled from a barrel. Defendant had in stock a quantity of large labels, four and one-half inches long by three and one-half inches wide, which had been furnished him for use in labeling the containers of the "Destroyer" upon deliveries being made to customers. The labels had printed thereon, in large letters, the words "Quack Grass Destroyer," "Poison," with a picture of a human skull and cross-bones, full directions for applying the mixture, and a warning to keep it away from stock. Such a label was not placed on the particular container. Instead thereof defendant used a small druggist's label, two and one-half inches long by one and one-half inches wide. Printed thereon, in red letters, was the word "Poison," with a picture of a human skull and cross-bones, and written under it were the words "Quack Grass Destroyer."

The evidence was conflicting as to what was said between plaintiff and defendant at the time of the transaction. The former testified that he was not told that the mixture was poisonous to live stock or anything to warn him in respect to the matter. A short time after the first purchase, plaintiff obtained of defendant one or two jugs more of the "Quack Grass Destroyer." There was evidence tending to prove that no label was used warning plaintiff of the dangerous character of the stuff. About August 1st, thereafter, his son, by his

directions, obtained of defendant, personally, three jugs of the "Destroyer." The evidence was, without conflict, that no label was used on any one of the jugs and there was evidence tending to prove that no warning was given of the dangerous character of the liquid on the last two occasions and that neither plaintiff nor his sons knew that the stuff would poison stock until the damage occurred. One of plaintiff's sons put the mixture on a small piece of quack grass, in an oat field, after the crop had been harvested and put in stack, and the same or another son, a few days thereafter, turned the cattle into the field. Eight cows died from eating the grass to which the mixture had been applied. What the sons did was by direction or approval of plaintiff.

At the close of the evidence, counsel for defendant requested the court to submit to the jury questions as follows: (1) Was the defendant guilty of any want of ordinary care that was the proximate cause of the accident? (2) Was the plaintiff informed when he made the first purchase, that the quack grass destroyer was a poison and dangerous to cattle? (3) Was the plaintiff guilty of any negligence which contributed to the accident? (4) Ought the defendant in the exercise of reasonable or ordinary care to have foreseen that an injury to the plaintiff's cattle might occur from a failure to label the last purchase of the quack grass destroyer? (5) Could the plaintiff, by the exercise of reasonable or ordinary care, have foreseen and prevented the accident? The request was refused except as the questions were included in the following: (1) Was the defendant wanting in the exercise of any ordinary care in making the sale of the three gallons of "Quack Grass Destroyer" on or about the 1st day of August, 1913? (2) If you answer question number 1 "Yes," then was such want of ordinary care the proximate cause of the death of the plaintiff's cows? (3) If you answer question number 1 "Yes," then was plaintiff or his son wanting in the exercise of ordinary care that contributed to

the death of said cows? (4) What was the reasonable market value of the eight cows lost by plaintiff on the 20th day of August, 1913?

The questions were all answered in favor of plaintiff, the value of the cows being placed at $450, and judgment was rendered accordingly.

Frank Winter, for the appellant.

J. Henry Bennett, for the respondent.

MARSHALL, J. Was there sufficient evidence to carry the question of defendant's negligence to the jury? That must be answered in the affirmative. The sale of such a poisonous substance as that in question, without the vendee being made aware of its dangerous character and the container being plainly labeled with the name of the substance, the word "Poison" and the name and address of the person, firm, or corporation dispensing the substance was, at the time in question, expressly prohibited by sub. 5, (a), sec. 1419, Stats. 1913, and violation of the prohibition made punishable as a misdemeanor. Such statute having been enacted for the protection of life and property, a violation of it, under a very familiar rule, is negligence *per se.* So there can be no question but what appellant was guilty as the jury found.

The court did not commit error in the instructions by confining the jury in answering the question of negligence of appellant to the facts in respect to the last sale. Whether such negligence was the cause of the damage which occurred is another question and was submitted as such.

On the subject of whether negligence of appellant in respect to the last sale of "Quack Grass Destroyer" was the proximate cause of what occurred to respondent's stock, the jury were left free to consider all the evidence in the case bearing on the question. If they were, or ought to have been, satisfied that respondent knew, from the circumstances of the first and second purchase of the destroyer, and the effect of

the mixture on quack grass, that it was poisonous to live stock, in case of their being permitted to eat grass which had been recently treated with it, then they might well have found in appellant's favor on the second branch of the case. They were evidently not so satisfied. It may be they ought to have been. Certainly there are circumstances pointing very strongly that way and there is much force in the argument of counsel for appellant in respect to the matter; but it seems there was sufficient basis for a contrary view that we ought not to hold the trial court was clearly wrong in deciding that it was within the province of the jury to settle the matter.

What has been said in respect to whether there was room in the evidence to warrant the jury in finding that appellant's negligence was the proximate cause of the damages suffered by respondent, bears on the contention that the finding of the jury on the subject of contributory negligence is entirely unsupported by the evidence. As we view the case, if there was a jury question in respect to the former proposition, there was, under the circumstances, as to the latter. The evidence, circumstantial and direct, is not very satisfactory on either branch of the case, except that of the appellant's negligence and respondent's damages; but it requires a pretty strong, clear case to warrant this court in reversing the trial court on the question of whether the evidence presents a field for jury duty to determine the facts. We are not satisfied that we have such a case here. The general manner in which appellant dispensed the "Destroyer;" his failing at any time to fully comply with the statute and failing on the last occasion of a sale, and perhaps on the second, to comply with it at all, as the jury had a right to find from the evidence, may reasonably have lulled respondent into security or failed to efficiently bring to his attention the fact, as to the dangerous character of the mixture when used as it was.

By the Court.—The judgment is affirmed.

DERR, Appellant, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

April 13—May 2, 1916.

Railroads: Collision at crossing: Contributory negligence: Absence of flagman: Driving unlicensed automobile: Violation of law, when precludes recovery: Proximate cause.

1. Whether or not the driver of an automobile which was struck by a train while crossing the tracks of a railroad was guilty of contributory negligence is *held* to have been a question for the jury, there being evidence showing that there were obstructions to the driver's view of the approaching train, and the evidence being conflicting as to the rate of speed at which he was driving, as to his looking and listening for an approaching train, and as to the absence from the crossing of a flagman who was customarily stationed there and upon whom the driver, as he testified, relied for warning of danger.
2. The fact that an automobile which was struck by a train had not been registered for the current year and was being driven in violation of sec. 1636—47, Stats., does not preclude a recovery for the injuries to the car and the driver, such violation of the law having no causal relation to the accident.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Reversed.*

The action is brought to recover damages for injury to the person and property of the plaintiff, resulting from a collision between one of defendant's trains and plaintiff's automobile.

Caledonia street runs north and south through the city of La Crosse and is crossed by seven parallel railroad tracks of defendant. On January 30, 1915, at about 9:30 o'clock in the evening, the plaintiff was driving his car north along Caledonia street toward this crossing. He testifies that he looked out for trains as he approached; that the view of the track to the east of the crossing is obstructed by a bank, some buildings, a fence, some shrubbery, and trees; that the defendant maintained a flagman and crossing gates at this grade

crossing and that he had knowledge of this fact and relied thereon. As plaintiff approached this crossing a train crew was pushing a loaded freight train ahead of an engine toward this same crossing from an easterly direction. The engine pushing the train was two blocks or more east of the crossing in question when the first car arrived on it. The jury found that no warning or signal of the approach of the train was given. The plaintiff testified that he looked for the flagman, but he was not in sight, and that after sounding his electric horn and receiving no warning he started to cross the tracks and was struck by the first car of this train which approached from the east.

The court submitted a special verdict and the jury in effect found (1) that the string of cars which struck plaintiff did not approach at a speed exceeding twelve miles an hour and that the crew in charge of the train was not wanting in ordinary care in stopping the train after discovering the peril of the plaintiff; (2) that defendant had kept and maintained a flagman at this crossing for a considerable time prior to the accident and that the plaintiff was acquainted with this fact; (3) that the flagman was absent from the crossing at the time of the accident and hence failed to signal plaintiff not to cross; (4) that such failure of the flagman to warn plaintiff and the absence of the flagman constituted a want of ordinary care on the part of defendant; (5) that the negligence of defendant in not having the flagman at the crossing and in failing to warn plaintiff of the approaching cars proximately caused the injury to plaintiff and his automobile; (6) that plaintiff was not guilty of negligence nor of gross negligence contributing to his injury; and (7) that plaintiff suffered damages in the sum of $900.

At the time of the accident the plaintiff was still driving his automobile under his 1914 registration number and had not as yet applied for or obtained a license or registration number for 1915.

The trial court decided that upon the conceded fact that plaintiff had made no application for a license as provided by sec. 1636—47, Stats., he was guilty of contributory negligence as a matter of law in driving his unlicensed motor car on the street, and changed the answer of the jury to the question on contributory negligence and directed an answer to the effect that plaintiff was guilty of a want of ordinary care which contributed to his injury. Upon the verdict as amended judgment was entered for the defendant dismissing the plaintiff's complaint with costs. From such judgment this appeal is taken.

Jesse E. Higbee, for the appellant.

For the respondent there were briefs by *Paul W. Mahoney, C. H. Van Alstine,* and *H. J. Killilea,* and oral argument by *Mr. Mahoney.*

SIEBECKER, J. The defendant contends that upon the evidence adduced the plaintiff was, as a matter of law, guilty of contributory negligence which precludes his recovering in the case. It is urged that the evidence shows that plaintiff, as he approached and passed the crossing, omitted to exercise ordinary care in failing to look and listen for approaching trains and in driving his car at an unlawful and dangerous rate of speed. An examination of the record discloses a sharp conflict in the evidence on the question of the rate of speed he was driving while approaching and crossing the railroad. The evidence of speed in this case necessarily rests on the opinion of the witnesses in estimating the speed of plaintiff's car from their observation under all the surrounding conditions. The character and nature of the evidence on this point permits of conflicting inferences as to this question and hence it was one within the province of the jury for determination. The trial court upon review of this evidence was of the opinion that it presented a jury question. We consider that this ruling cannot be disturbed by this court.

It is strenuously urged that plaintiff approached the track without looking and listening for the approaching cars and that had he done so he would, in the exercise of reasonable care, have seen the cars in time to have avoided the collision. This claim of the defendant involved consideration of the facts and circumstances respecting the maintenance of a flagman at this crossing and plaintiff's knowledge thereof. If the facts are that such a flagman customarily signaled to approaching travelers to protect them against existing dangers of approaching cars and trains and plaintiff knew this and relied on the absence of such signal when he approached the crossing as indicating that no car or train was approaching, then plaintiff's conduct as to looking and listening for moving cars while approaching the crossing must be considered in the light of these circumstances. The court declared in *Burns v. North Chicago R. M. Co.* 65 Wis. 312, 27 N. W. 43, that:

"The traveler might in this way be lured into danger, when, if no flagman had ever been kept there, he would not have looked for such a signal, but would have looked and listened for other signs of an approaching train. We cannot but approve of the authorities . . . , which hold that the withdrawal of a flagman from a crossing where he is usually kept to signal approaching travelers, is negligence."

The trial court in speaking of the defendant's claim that the evidence does not justify the jury's findings on the issues submitted to the jury respecting the maintenance and the presence of a flagman at the crossing correctly states the situation presented by the facts:

"It was undisputed that the company did and for some time prior to the accident had maintained a flagman, and the question submitted was whether or not he was present and attending to his duties at and immediately prior to the happening of the accident."

The evidence is in dispute as to the flagman's presence and to his giving the required signal to plaintiff, and it was therefore for the jury to determine this issue. There is also evi-

dence tending to show that plaintiff's view of the approaching cars from the east, as he approached from the south, was obstructed by a bank, buildings, shrubbery, and trees. Upon a consideration of all the facts and circumstances of the case, showing the way and manner plaintiff approached the crossing and drove his car, we consider that the trial court properly submitted the questions of plaintiff's contributory negligence to the jury and their verdict cannot be disturbed.

The court, however, set aside the finding of the jury on this issue upon the ground that plaintiff had obtained no license to operate his car on the highways of the state. Sec. 1636—47, Stats., provides:

"No automobile . . . shall be operated . . . or driven along or upon any public highway of the state, unless the same shall have been registered or application for the registration of the same shall have been made and forwarded to the secretary of state accompanied by the requisite fee therefor in accordance with the provisions of sections 1636—47 to 1636—57."

The trial court followed the adjudications of the Massachusetts court on this subject, which are to the effect that the driving of an unregistered automobile on the highways in violation of law precludes a person from recovering for injuries, upon the ground that such unauthorized use of the highway is a trespass and puts the trespasser beyond the protection the law affords to persons lawfully traveling on the highways. In *Dudley v. Northampton St. R. Co.* 202 Mass. 443, 89 N. E. 25, the court says that the legislature ". . . intended to outlaw unregistered machines, and to give them, as to persons lawfully using the highways, no other right than that of being exempt from reckless, wanton, or wilful injury." And further, "The real question here is doubtless whether the legislature has created a duty to other travelers upon the highways, or merely a public duty to be enforced in the ordinary administration of the criminal law, while civil rights and liabilities are left to be governed by the general

rules which are applicable in such cases, between parties one of whom has been guilty of a violation of law." Plaintiff's counsel contends that this court has expressly repudiated this doctrine of the Massachusetts court in *Sutton v. Wauwatosa,* 29 Wis. 21, and subsequent cases. See *Knowlton v. Milwaukee City R. Co.* 59 Wis. 278, 18 N. W. 17; *Gabbert v. Hackett,* 135 Wis. 86, 115 N. W. 345; and *Ludke v. Burck,* 160 Wis. 440, 152 N. W. 190. In the *Sutton Case* this court was urged to follow the Massachusetts doctrine in cases where persons were injured while traveling on highways in violation of the law prohibiting such travel on Sunday. The court, however, rejected that doctrine and held that "The fact that plaintiff, at the time he suffered injuries to his person or property from the negligence of defendant, was doing some unlawful act, will not prevent a recovery, unless the act was of such a character as would naturally tend to produce the injury." The court stated:

"The fact that the traveler may be violating this law of the state, has no natural or necessary tendency to cause the injury which may happen to him from the defect. All other conditions and circumstances remaining the same, the same accident or injury would have happened on any other day as well. The same natural causes would have produced the same result on any other day, and the time of the accident or injury, as that it was on Sunday, is wholly immaterial so far as the cause of it or the question of contributory negligence is concerned."

This reasoning is applicable to the case at bar. The fact that plaintiff was driving an unregistered car in violation of the law at the time of collision had no causal relation to the happening of the accident. Obviously under all the conditions and circumstances of this case the same result would have followed if plaintiff's car had been registered as required by law. The doctrine of the *Sutton Case* was followed in principle in *Ludke v. Burck,* 160 Wis. 440, 152 N. W. 190, which dealt with that part of the statutes embraced in secs. 1636—47 to 1636—57, prescribing a penalty for

driving automobiles in cities at a rate of speed in excess of the prescribed limit. It was there declared:

"Such regulations are not intended to abrogate the duties of travelers recognized by the common law for their mutual safety and leaves them subject to its accepted rules of ordinary care and the duties that spring from their relations as travelers on a public highway."

We find nothing in these statutes to indicate that the legislature intended to deprive a person who is injured while driving an unregistered car on a highway of the protection of the law that is accorded to other travelers under the same circumstances. To bar such an injured person from invoking his rights of a traveler on the highway it must appear that his violation of the law was a proximate cause of the injury suffered. No such relationship exists here. The plaintiff's violation of law had no proximate causal relation to the accident, as defined in the law of negligence, and hence in no way contributed to cause the injury. In *Armstead v. Lounsberry,* 129 Minn. 34, 151 N. W. 542, the supreme court of Minnesota holds that the driving of an unregistered automobile in violation of a statute similar in its provisions to those involved here, does not in itself bar the right to a recovery for injuries proximately caused by the negligence of another. Among the decisions of other courts to the same effect are the following: *Armstrong v. Sellers,* 182 Ala. 582, 62 South. 28; *Lockridge v. M. & St. L. R. Co.* 161 Iowa, 74, 140 N. W. 834; *Hemming v. New Haven,* 82 Conn. 661, 74 Atl. 892; and *Atlantic C. L. R. Co. v. Weir,* 63 Fla. 74, 58 South. 641. It is considered that the trial court erred in changing the answer of the jury to the question on contributory negligence and that the verdict of the jury must stand.

By the Court.—The judgment appealed from is reversed, and the cause is remanded to the circuit court with direction to the court to restore the jury's answer to question 13 of the special verdict and to award judgment in plaintiff's favor upon the verdict as rendered by the jury.

GARDNER, Respondent, vs. YOUNG'S ESTATE, Appellant.

April 13—May 2, 1916.

Guardian and ward: Claims, how barred: Witnesses: Competency: Transactions with person since deceased: Waiver of objection.

1. **Sec. 3995*b*, Stats., is the only statute providing for barring claims against persons under guardianship; and where that section was not complied with in that no petition was filed and no order of the county court fixed a time and place for the examination and adjustment of claims or fixed a time after which claims, if not presented, should be barred, claims were not barred otherwise than by the ordinary statutes of limitation.**
2. **Permitting a claimant to testify as to personal services rendered by her to a decedent, upon which her claim against his estate is based, will not be held error where no proper objection was seasonably made.**

APPEAL from a judgment of the circuit court for Trempealeau county: JAMES O'NEILL, Judge. *Affirmed.*

A claim was filed by plaintiff and respondent against the estate of Dr. William M. Young, deceased, for services alleged to have been performed by her from October 1, 1902, to the 5th day of June, 1909, the date of Dr. Young's death.

Dr. Young during the latter part of his life owned the Commercial Hotel in Galesville, Wisconsin, where he lived, had his office and sleeping room. In 1898 he leased this hotel to the husband of plaintiff, the lease providing, among other things, that Dr. Young should continue to live in the Commercial Hotel and have his offices there. The lease was for five years, ending in May, 1903, when a new lease was made running for three years. During the period from date of the first lease, June 1, 1898, to the date of the death of Dr. Young, June 5, 1909, he continued to board and keep his office and sleeping room in said hotel.

The claim filed was for special services rendered by plaintiff, *Annie Gardner,* for Dr. Young, deceased.

In the county court the claim of plaintiff was allowed at

$4,000, and upon appeal to the circuit court was reduced to $3,120 with interest. The court below made the following findings:

"That said Wm. M. Young, deceased, was during his lifetime, and on or about the 3d day of March, 1908, duly declared an incompetent by the county court of said county of Trempealeau and a guardian of his person and estate duly appointed by said county court, who duly qualified therefor and entered upon the duties of his office, and from that time until the death of said Wm. M. Young performed the duties and functions of such guardian.

"That for many years prior thereto and until the date of his death the said Wm. M. Young, which occurred on the 5th day of June, 1909, was in poor health, and during all the time included within the findings herein was in need of personal care, nursing, and attention, and that he was a single man and had no near relatives under legal obligations to furnish to him such care, nursing, and attention.

"That during the lifetime of said Wm. M. Young and within the six years prior to his death the said *Annie Gardner* performed labor and services, consisting of personal care, nursing, and attention, and which said personal care, nursing, and attention were necessary and proper for his safety and comfort; that such services were of a character suitable to his station in life and that he was amply able to pay for them, and were of the reasonable value of ten ($10) per week for a period of six years prior to his death.

"That the said *Annie Gardner* has never received any consideration therefor from the said Wm. M. Young, or from his estate, or from any personal representative, guardian, or any other person for or on behalf of the said Wm. M. Young, and the whole thereof is due and owing to the said *Annie Gardner.*

"That on the 24th day of November, 1913, the said plaintiff duly filed in the county court of the said county of Trempealeau her duly verified claim therefor pursuant to notice to creditors given in the matter of the estate of Wm. M. Young, deceased.

"That during the period of the guardianship hereinbefore mentioned, no notice to creditors was ever given as required by law, and that the said claim is not barred by any statute or law of this state relating to the filing, allowance, or settlement of accounts of persons under disability.

"That said services were not performed by the said plaintiff by virtue of any contract, lease, or agreement made between the said Wm. M. Young and the husband of the said *Annie Gardner,* nor by virtue of any oral understanding or agreement between them, and that the character of such services were not such as are embraced within the terms or meaning of any lease or contract between the said Wm. M. Young and the husband of said *Annie Gardner* as mentioned in the answer of the administrators filed herein.

"That no part of the claim hereinafter allowed is barred by the statute of limitation.

"That the said *Annie Gardner,* during the time of the said performances of such labor and services, was a married woman and the wife of one Edward Gardner.

"That all of such services so rendered were performed by the said *Annie Gardner* for and on her own behalf, and that at the time of the performances of the same she expected to be compensated therefor and to receive and have such compensation as her own property and estate, and that said husband, Edward Gardner, had full knowledge thereof and consented thereto.

"That such services so rendered were not within the scope of the ordinary duties of housewife, nor constituted any part of the duties that the said *Annie Gardner* owed to her husband in the business in which he was engaged, and that the compensation herein allowed for such services is the individual earnings of said *Annie Gardner* accruing from labor performed in her own behalf and is her separate property."

The court concluded "That the said plaintiff, *Annie Gardner,* is entitled to judgment herein against the defendant, the estate of Wm. M. Young, deceased, in the sum of three thousand one hundred twenty ($3,120) dollars, together with interest thereon from the 24th day of November, 1913, at the rate of six per cent. per annum, in all the sum of three thousand four hundred sixty and 80-100 ($3,460.80) dollars, together with the costs and disbursements of this action, to be hereafter taxed."

Judgment was entered accordingly, from which this appeal was taken.

Ole J. Eggum, for the appellant.

For the respondent there was a brief by *R. S. Cowie* and *A. T. Twesme,* attorneys, and *Edward Lees,* of counsel, and oral argument by *Mr. Lees* and *Mr. Cowie.*

KERWIN, J. It is contended that the court below erred in holding that the claim of respondent filed against the estate of Dr. Wm. M. Young was not barred by proceedings in guardianship matter had in the county court.

On the 14th day of March, 1908, Dr. Young was declared an incompetent and one E. F. Clark, of Galesville, Wisconsin, was appointed general guardian of said Young and continued as such guardian until the death of Dr. Young, which occurred about a year thereafter.

The claim filed covers the period from 1902 to the time of the death of Dr. Young in 1909, but it is conceded that the portion of the claim which accrued more than six years before the death of Dr. Young is barred by the statutes of limitation, and the court below so held and included no item of the claim which accrued prior to six years before Dr. Young's death in the allowance made to the respondent.

It is insisted by counsel for appellant that all such parts of the claim bearing date prior to March 14, 1908, are barred by a notice to creditors and proceedings relative to the proof of claims against wards and deceased persons. The infirmity in this contention is that no proceeding in compliance with the statute for barring claims against the estate of Dr. Young was had in the guardianship proceeding. Sec. 3995*b*, Stats., is the only statute providing for barring claims in guardianship proceedings, and this statute provides for commencement of the proceedings by filing a petition, and directs that when a proper petition has been filed the county court shall make an order fixing time and place for the examination and adjustment of claims against the ward, and that if claims be not presented accordingly they shall be barred. This section further provides that after the order has been made no suit can be maintained against the ward, etc. This statute was

not complied with in the instant case, and the question arises whether the claim could be otherwise barred. It is insisted on the part of the appellant that it could, under certain provisions of the statute referred to by appellant and which will be considered. Sec. 3982 provides in substance that guardians appointed shall pay the debts of the ward, and that "unless special provision be made all proceedings for the presentation, allowance and adjustment of claims and demands against persons under guardianship shall be had and made as provided in these statutes relating to the estates of decedents." This section does not bar claims not filed. The provision for bar is contained in sec. 3844, which relates to claims against deceased persons and not claims against wards. It will be seen that sec. 3982 refers to procedure only in regard to filing claims. The statute of limitation as to claims against deceased persons is sec. 3844, and makes no reference to claims against persons under guardianship. Sec. 3995*b* is the only statute providing for bar of claims against persons under guardianship, and this statute plainly has not been complied with in the instant case; hence the claim was not barred. The proceeding in county court did not comply with sec. 3995*b*. No petition was filed; the order of the county court did not fix a time and place for the examination and adjustment of claims against the ward, nor fix a time within which claims must be presented or be thereafter barred. The order in the instant case does not limit the time within which claims must be presented, or provide that claims not presented at the time and place fixed in the order shall be thereafter barred, therefore does not comply with the statute. *Britt v. Estate of Ide,* 75 Wis. 113, 43 N. W. 559.

Sec. 3838, Stats., relates to claims against deceased persons; sec. 3840 provides for fixing time for presenting claims in case of granting letters of administration; sec. 3840*m* provides for order of publication under sec. 3840 when publication has not been made; and sec. 4050 provides that when the court orders notice published it shall be sufficient if a brief

statement of the matter to be heard, sufficient to fairly inform the interested parties of the nature of the proposed proceeding and the estate involved, be published. None of these sections affect the questions in the instant case.

Error is assigned in the admission of testimony of the respondent, *Annie Gardner,* in relation to the services performed by her for the deceased, Dr. Young. It is claimed that such testimony was not admissible under sec. 4069, Stats. Our examination of the record has failed to disclose any proper objection to the evidence. But even if proper objection were made, we think the evidence was admissible. *Estate of Kessler,* 87 Wis. 660, 59 N. W. 129.

All other material propositions discussed by counsel for appellant involve questions of fact.

The findings set out in the statement of facts are well supported by the evidence, and support the judgment. It is unnecessary to extend this opinion by a discussion of the evidence. We find no error in the record.

By the Court.—The judgment is affirmed.

MIRANOVITZ and another, Respondents, vs. GEE and another, Appellants.

April 14—May 2, 1916.

Vendor and purchaser of land: Fraud: Fiduciary relation: Rescission of contract: Actionable representations: Fact or opinion? Waiver of right to rescind: False testimony as barring right to relief: Letter of trial judge: Findings of fact.

1. A fiduciary relation exists when confidence is reposed on one side and there is a resulting superiority and influence on the other; and the relation and duties involved in it need not be legal, but may be moral, social, domestic, or merely personal.
2. Thus, where ignorant foreigners who spoke English very imperfectly supposed that in purchasing certain land and personal property they were represented by a fellow countryman in whom they trusted and who assured them that he would give them a

good deal and that they could depend upon him in making a fair transaction for them, but who was in fact the paid agent of the vendors, the relation of such agent to the purchasers was of a fiduciary character and for his false statements in respect to the property the vendors are liable, although no artifice or trick was used to induce reliance thereon or prevent investigation.

3. Under the circumstances above stated the purchasers, having no other means of ascertaining the facts as to the value of the property, had a right to rely upon the representations of the agent relating to the value of the land, the quality of the soil, the extent of the cultivated area, and the value of the stock and crops, and such representations, even though they took the form of expressions of opinion, are to be considered as statements of fact.
4. The representations made being statements of fact, false, material, and relied upon by the purchasers, they had a right to rescind the contract even though the property was actually worth the price paid for it.
5. It is not necessary, in such a case, that the representations made be of such a character as to influence the conduct of a person of ordinary intelligence and prudence.
6. Although made in good faith, false statements are actionable if material and relied upon by the party to whom they are made.
7. Where plaintiffs had been induced by false representations to purchase land and personal property from defendants for $3,500, paying $800 down and giving a mortgage on the personalty for $600 and a mortgage on the land for $2,100, and defendants knew that plaintiffs could not make the payments, the sale of a small part of the personal property by plaintiffs was not a waiver of the right to rescind.
8. A letter sent to counsel by the trial judge, in transmitting a copy of his decision, in which the court remarked that it was apparent that one plaintiff "was lying whenever he saw a chance to lie," is not, if proper to be considered at all, a sufficient basis for denying equitable relief to plaintiffs on the ground that they testified falsely, where the findings of fact subsequently made and twice reviewed by the court contained no reference to the matter.

APPEAL from a judgment of the circuit court for Wood county: BYRON B. PARK, Circuit Judge. *Affirmed.*

Action by vendees to rescind contract for the purchase of certain real estate and personal property. Plaintiffs are Russian Jews, one being thirty and the other twenty-five years of age. They came to this country about four years ago, and

on June 27, 1914, purchased certain lands and personal property of the defendants for $3,500, paid $800 down, and gave a chattel mortgage for $600 on the personal property and a mortgage for $2,100 on the real estate. Plaintiffs went into possession of the property, which they claimed was represented to them as worth $4,000, upon which there were certain stated amounts of crops growing, the soil being represented as fertile; that said representations were in fact untrue; that plaintiffs knew nothing about farming in this country, did not know how much land was included in an acre, and they supposed themselves to be represented by one Ginsberg as a friend and countryman, who was in fact the agent of the defendants and received a commission for making the sale to plaintiffs. The defendants denied the allegations of the complaint and alleged that the plaintiffs were estopped from claiming a rescission of the contract by reason of the fact that plaintiffs had disposed of some parts of the personal property and had not made a sufficient tender back of the property received by them to entitle them to rescission. The trial court found for the plaintiffs, who had judgment rescinding the contract and awarding them $800, the amount of money paid down by them. From such judgment defendants appeal.

For the appellants there was a brief by *D. D. Conway,* attorney, and *Grady, Farnsworth & Kenney,* of counsel, and oral argument by *Mr. Conway* and *Mr. Daniel H. Grady.*

For the respondents there was a brief by *Goggins, Brazeau & Goggins,* and oral argument by *Hugh W. Goggins* and *Theo. W. Brazeau.*

ROSENBERRY, J. The defendants attack the findings on the ground that they are contrary to the great preponderance of the evidence. Briefly stated, the findings so far as material are as follows: Plaintiffs were uneducated and ignorant and able to speak the English language very imper-

fectly; were entirely ignorant of farm-land values, the care or value of stock or machinery, or the measure of land, and of every other matter connected with farming or farm life, and prior to the day on which the transaction was concluded had never been in Wood county, where the land was situated, and knew nothing about lands or land values in the vicinity of the city of Grand Rapids or of the character of the soil, and had never had any experience in farming; that plaintiffs came to the city of Grand Rapids and applied to one Jacob Ginsberg, a fellow countryman, who assured the plaintiffs that he was well acquainted with real estate in the vicinity of Grand Rapids, that he would give them a good deal, and that they could trust him and depend upon him in making a fair transaction for them; that the defendants on June 27, 1914, were the owners of the property in controversy; that the land, forty acres in extent, had been used for many years without fertilization or care, was sandy land of which twenty-five acres were cleared, and with the exception of six or eight acres greatly run down and of little fertility and incapable of producing good crops, all of which was known to Ginsberg and the defendants; that the forty acres of land in question, together with the buildings thereon, was worth on the 27th day of June, 1914, not to exceed $1,800, the personal property not to exceed $1,000, and the crops growing thereon not to exceed $200, a total value not exceeding $3,000; that prior to June 27, 1914, the defendants had informed Ginsberg of their desire to sell the property in question, and that on that day he acted as the agent of the defendants and was paid $300 for his services; that on said 27th day of June the plaintiffs went upon the land in question, remained there about forty-five minutes, were given a lunch, and were told by the defendants that there were sown and planted seven acres of corn, fifteen acres of rye, and six acres of potatoes; that plaintiffs went over the farm and through the house and barn and looked at the stock; that at the time of said visit the personal

property was represented by Ginsberg to them as worth $1,200, the crops as being worth $500; that $30 per month could be made from the sale of milk; that the farm would produce 100 bushels of potatoes to the acre, and that there were six and one-half acres of potatoes, seven acres of corn, and eighteen acres of rye growing thereon, and that said farm, crops, and personal property were worth $4,000; that the plaintiffs relied on such statements and would not have purchased except for such representations; that there was in fact growing on the farm on the day in question not to exceed fifteen acres of rye, five or six acres of corn, and three and one-half acres of potatoes, and that Ginsberg knew at the time of making such representations as he did make that they were false; that plaintiffs entered into a contract to purchase by which they were to pay $3,500 for the land, personal property, and crops, $800 being paid down, $600 being secured by chattel mortgage upon the personal property, and $2,100 by a mortgage upon the real estate in the usual form; that it was the duty of the defendants to disclose to the plaintiffs that the tillable land on such farm, with the exception of six or eight acres, was so greatly run down as not to be in condition to produce any substantial crops, which fact could not be ascertained by the plaintiffs by any reasonable inspection; that the defendants in fact knew that the plaintiffs could not pay for said land, would be unable to raise or buy sustenance for the cattle and horses on the farm, and that the defendants did in fact on the 21st day of October, 1914, foreclose the chattel mortgage and take substantially all of the personal property from the plaintiffs; that proper tender was made and demand for rescission of the contract; and certain other facts were found relating to an accounting not material here.

The plaintiffs had judgment canceling and rescinding the contract, and the amount paid down by them, $800, was made a lien upon the premises, with interest from the 1st day of August, 1914, less the sum of $84.50 received by the plaintiffs from the sale of personal property.

The case was very vigorously contested. The trial commenced on January 21, 1915, and closed the next day. The parties were directed to file briefs, which they did. There was a brief for the plaintiffs, a brief for the defendants, a plaintiffs' reply brief, and a rejoinder by the defendants. On March 12, 1915, the court filed its decision in writing, stating at considerable length the facts as found by him, and directed the plaintiffs' attorneys to prepare findings in accordance therewith and submit the proposed findings to defendants' attorneys. On March 12, 1915, the judge, in transmitting a copy of his decision to the attorneys in the case, accompanied the same with a letter in which he used the following language: "All during the trial of this case I felt the utmost sympathy and compassion for the plaintiffs. My feeling for them was not greatly changed, although it was apparent *Ben* was lying whenever he saw a chance to lie." On April 26th, and before the findings were signed, the defendants made a motion requesting the court to reopen the case and take additional evidence. On June 1, 1915, there was a hearing on this motion. In disposing of the motion to reopen the case and present further testimony, the court said in its decision handed down June 5, 1915:

"I listened carefully to all the affidavits when they were read in court. Since then I have gone over the entire case and have carefully read all the affidavits."

The court carefully reviewed the matters presented on the hearing and denied defendants' motion. On June 19, 1915, defendants made a motion "to modify and supplement the findings heretofore made and filed in the above entitled action and to substitute the annexed proposed findings for those found." The motion was heard on August 7, 1915, and on the same day the court denied the motion, after carefully considering the propositions advanced by the defendants, and the findings signed as of the 5th day of June, 1915, became the findings of fact and conclusions of law in the case.

This case had the very careful and thorough consideration of

the trial judge on three separate and distinct occasions and each time the entire case became the subject of the trial court's consideration. He approached the matter in the beginning apparently with some doubts as to his duty in the premises, but a review of the record shows that at the time he finally disposed of the matter he did so under the clear and definite conviction that his disposition was right. We have carefully examined the evidence, and while it is not free from troublesome questions we are of the opinion that the trial court's conclusion is right, and we certainly cannot disturb the findings as contrary to the clear preponderance of the evidence.

We are urged to reverse the judgment as not supported by the findings for three reasons: (1) That the court erred in its conclusion that the facts found justified rescission. (2) That the court erred in its conclusion that the plaintiffs had not waived the right to rescind. (3) That the plaintiffs were not entitled to equitable relief for the reason that they testified falsely upon the trial.

Defendants argue that representations as to value or mere failure to disclose certain facts, where there is no artifice or trick used to induce reliance or prevent investigation, in the absence of a confidential or fiduciary relation between the parties, cannot constitute the basis of an action for damages for deceit or right in equity to rescission, and cite *Morgan v. Hodge,* 145 Wis. 143, 129 N. W. 1083; *Francois v. Cady L. Co.* 149 Wis. 115, 135 N. W. 484; and *Farr v. Peterson,* 91 Wis. 182, 64 N. W. 863.

1. There are two answers to this contention: (a) The court found that the plaintiffs supposed themselves to be represented by Ginsberg, a fellow countryman in whom they trusted, whereas in fact Ginsberg was the paid agent of the defendants. This fact of itself, even if not sufficient to raise a presumption of fraud, certainly subjects the conduct of the defendants to very close scrutiny. A fiduciary relation exists when confidence is reposed on one side and there is resulting superiority and influence on the other; and the relation and

duties involved in it need not be legal, but may be moral, social, domestic, or merely personal. *Hensan v. Cooksey,* 237 Ill. 620, 86 N. E. 1107; *Beach v. Wilton,* 244 Ill. 413, 91 N. E. 492; *Beare v. Wright,* 14 N. Dak. 26, 103 N. W. 632. The trial court undoubtedly had this rule in mind. In the decision preceding the formal findings the court said:

"The utter incapacity of the plaintiffs was such that no artifice or trick was necessary and none seems to have been resorted to. The plaintiffs trustingly placed themselves and their $800 at the disposal of Ginsberg. Ginsberg knew this and fraudulently landed both them and their $800."

Under such circumstances the relation of Ginsberg to the plaintiffs was of a fiduciary character and he was bound to speak the truth. This he did not do, and the defendants are bound by his act.

(b) The statements made by Ginsberg, although relating to value, the quality of the soil, the extent of the cultivated area, and the value of the stock and crops, were not necessarily for that reason merely statements of opinion. Representations may be statements of opinion or allegations of fact so called, depending upon the circumstances in view of which they are made. "The mere fact that a statement takes the form of an expression of opinion, however, is not always conclusive. Whenever there is any doubt as to whether it is made as a mere expression of opinion or as a statement of fact, the question must be determined by the jury or court." *J. H. Clark Co. v. Rice,* 127 Wis. 451, 106 N. W. 231.

Where the statements take the form of expressions of opinion, as "There was ore enough on the dump to run the mill five years," and that "it was a high grade of ore," they are statements of fact. " 'That there was half a million dollars worth of ore on the dump ready to mill' is somewhat in the nature of an expression of opinion, but not clearly so, and when coming from the seller who was narrating what he had seen on the property to a buyer who never saw it and had no reasonable opportunity to see it must be considered a state-

ment of fact." *Rogers v. Rosenfeld,* 158 Wis. 285, 290, 149 N. W. 33.

"The plaintiff does not deny that he stated to Mrs. Albertz that his property was worth $14,000,—a statement made to induce her to sign the contract. Whether we regard it as a mere expression of opinion or an absolute representation of fact, it is a circumstance proper to be considered on the question of the specific performance of the contract, with the other facts in the case. The conditions were such that it had the force and effect of an express representation, so far as the rights of Mrs. Albertz are concerned." *Mulligan v. Albertz,* 103 Wis. 140, 148, 78 N. W. 1093.

"True, generally speaking, a mere opinion as to the value of property offered for sale, however extravagant, will not void the sale, if one be thereby made, on the ground of fraud. *Maltby v. Austin,* 65 Wis. 527, 27 N. W. 162; *Fowler v. McCann,* 86 Wis. 427, 56 N. W. 1085. Neither will a false representation as to future matters, or a promise to do some act in the future which the promisor does not intend to perform. *Patterson v. Wright,* 64 Wis. 289, 25 N. W. 10. The rule as to representations of value applies strictly only where the parties are dealing at arm's length and on equal terms. It does not apply where the relations between them are of a fiduciary character or of trust and confidence, or the person to whom the representations are made is incompetent to do business or knows personally nothing about the subject of the sale and is purposely induced, by the conduct of the vendor, not to inform himself but to act under the advice of such vendor and the influences by him used to that end." *Horton v. Lee,* 106 Wis. 439, 444, 82 N. W. 360.

Mere exaggerated statements by the vendor of land as to its value, and purchase by the vendee at such valuation, are not sufficient ground for rescinding the contract, where both parties had equal opportunities for ascertaining the value and there is no proof of fraudulent intent in the vendor. *Suessenguth v. Bingenheimer,* 40 Wis. 370.

Representations by the vendor of a farm that the pasturage was sufficient for twenty-five head of cattle, that the hay land grew hay sufficient to enable twenty-five head of cattle

to be kept, and that there was a cranberry marsh on the land producing ten to twelve bushels of cranberries each year, although expressions in the form of opinions, were held to be statements of fact fraudulently made with intent to deceive, and, being relied upon by the defendants, were actionable. *Brustman v. Dunn,* 161 Wis. 306, 154 N. W. 361.

In 35 L. R. A. 417, a large number of cases are cited under the title "Expressions of opinion as fraud," and in 37 L. R. A. 593, a like number of cases are quoted under the title "Right to rely upon representations made to effect contract as a basis for a charge of fraud."

The attempt to base a distinction upon the difference between an "opinion" and a "fact" has resulted in much confusion; representations in one case being held to be matters of opinion and representations in another case of exactly the same character being held to be statements of fact. This distinction is oftentimes uncertain, indefinite, and unreal.

"In the first place no such distinction is scientifically possible. We may in ordinary conversation roughly group off distinct domains for 'opinion' on the one hand and 'fact' or 'knowledge' on the other; but as soon as we come to analyze and define these terms for the purpose of that accuracy which is necessary in legal rulings, we find that the distinction vanishes, that a flux ensues, and that nearly everything which we choose to call 'fact' either is or may be only 'opinion' or inference. . . . This doctrine is not sustained by sound psychological or metaphysical analysis." 3 Wigmore, Evidence, § 1919.

A study of the cases suggests the thought that, in the absence of an express intent to defraud, the determination of whether or not certain representations are statements of fact or of opinion depends upon whether or not the person to whom the representations are made may, under all the facts and circumstances of the case, including such person's capacity or want of capacity, rely upon them. Where the person to whom they are made may rely upon them they are held to be statements of fact; where the person to whom they are

made may not rely upon them, without being guilty of a want of ordinary care and prudence, they are denominated opinions. In this case the plaintiffs, in view of the fact that they supposed themselves to be represented by a friend and countryman, having no other means of ascertaining the facts with reference to the value of the property, and lulled into security by the statement of their supposed friend that he would see that they got a good deal, were clearly entitled to rely upon the statements made to them, and the representations were statements of fact and not expressions of opinion. *Morgan v. Hodge,* 145 Wis. 143, 129 N. W. 1083; *Hull v. Doheny,* 161 Wis. 27, 152 N. W. 417.

Under the established rule, the representations made were statements of fact, were false, material, and were relied upon by the plaintiffs, and they had a right to rescind the contract even though the property were worth the price paid for it. *Greiling v. Watermolen,* 128 Wis. 440, 446, 107 N. W. 339.

It is not necessary that the representations made be of such a character as to influence the conduct of a person of ordinary intelligence and prudence. "There is no such issue in an action for deceit. The sole question is whether the representations in fact deceived the party involved and materially affected his conduct. Effectiveness of deceit is to be tested by its actual influence on the person deceived, not by its probable weight with another." *Bowe v. Gage,* 127 Wis. 245, 106 N. W. 1074; *Barndt v. Frederick,* 78 Wis. 1, 47 N. W. 6; *Kaiser v. Nummerdor,* 120 Wis. 234, 97 N. W. 932.

Statements may be made in good faith, nevertheless if they are material, are relied upon by the party to whom they are made, and are false, they are actionable. *First Nat. Bank v. Hackett,* 159 Wis. 113, 149 N. W. 703.

2. The trial court was clearly right in its conclusion that the plaintiffs had not waived their right to rescind. The circumstances of the plaintiffs were such that the sale of a small part of the personal property cannot be held to be a waiver of

their right to rescind. We do not deem further discussion on this point necessary.

3. The argument of counsel for defendants that equitable relief should be denied the plaintiffs on the ground that they testified falsely is based upon the remark of the trial judge, contained in a more or less personal letter addressed by him to counsel and accompanying his decision dated March 12th. The use of a letter of this kind for the purpose of attempting to impeach the record is, to say the least, of doubtful propriety. Since writing the letter the court has twice reviewed the case and at its conclusion had no doubts whatever as to the correctness of the findings as signed. This court has said:

"Probably substantially all the evidence bearing on that question was produced and it was passed upon in the findings, though not in the opinion. The latter is of little consequence except as explanatory of the findings. It was an unnecessary effort. The findings which, in contemplation of the written law, were made by the trial judge, and in the opinion of the writer should always be so made in fact, must be taken as the judicial conclusion in the case both as to matters of fact and of law." *Becker v. Beaver M. Co.* 158 Wis. 471, 474, 149 N. W. 209.

If the opinion, a more or less formal document, and prepared for filing as a part of the record, is of little consequence, a chance remark of the trial judge, made in a letter transmitting a copy of the opinion, must be of still less consequence. Certainly it is not sufficient to overturn the deliberate conclusion of the court as embodied in the findings made subsequently and after twice considering the entire case.

By the Court.—Judgment affirmed.

T. W. STEVENSON COMPANY, Respondent, vs. PETERSON, Appellant.

April 14—May 2, 1916.

Novation: What constitutes: Assent of creditor, how proved: Evidence: Sufficiency.

1. The essentials of a novation are a mutual agreement between a debtor, his creditor, and a third person by which such third person agrees to be substituted for such debtor and the creditor assents thereto, extinguishing the obligation of such debtor to such creditor and creating in place thereof an obligation of such third person to such creditor.
2. The assent of the creditor to the substitution of a new debtor in place of the old one need not be given by any writing or by express words, but may be shown by circumstances and the conduct of the parties.
3. In an action to recover the amount due for merchandise sold to defendant, the evidence—showing, among other things, that plaintiff was fully informed that defendant had sold his business and stock in trade to third persons who agreed to pay the debt in suit and become substituted in his place as debtor; that thereafter plaintiff treated the account as an indebtedness of such third persons, extended the time for payment at their request, obtained notes from them for the amount, with material advantages over permitting it to stand on mere open account, and notified such person that the notes had been placed to their credit—is *held* to establish circumstantially plaintiff's assent to the substitution of the third persons as debtors in place of the defendant.

APPEAL from a judgment of the circuit court for Dunn county: GEORGE THOMPSON, Circuit Judge. *Reversed.*

Action to recover an amount claimed to be due for a quantity of merchandise sold by plaintiff to the defendant. The defendant answered that there was a contract of novation whereby he sold the merchandise in question and his entire stock of goods to R. R. Porter & Son, they agreed to pay his indebtedness to plaintiff, and it agreed to take them as debtor in his place; and further answered that, after defendant's vendees agreed to pay plaintiff, the latter and such vendees,

without defendant's knowledge or consent, agreed that the time of payment of the debt, which was due January 1, 1914, should be extended, one half to May 1, 1914, and one half to July 1, 1914, such vendees to give their notes for such payments bearing interest at the rate of seven per cent. per annum from January 1, 1914, and agreeing therein to pay, in addition to principal and interest, exchange and collection charges; and that notes were given accordingly, thereby extending the time of payment of the debt without defendant's consent.

The evidence showed this: Defendant informed plaintiff by letter of his having made an agreement with Porter & Son as indicated in the answer and asked to have his debt charged to them and a proper credit to be given to him. Later plaintiff wrote Porter & Son, mentioning the letter from defendant and stating that it was presumed the understanding between defendant and Porter & Son was that the latter would pay the debt and asking a confirmation. Later, plaintiff wrote Porter & Son stating that if they intended to pay the debt to reply promptly by check or otherwise. Later, plaintiff wrote defendant, acknowledging his letter, aforesaid, stating that it had written Porter & Son without receiving a reply, that it expected payment by them or him, and asking the latter to take up the matter with them. Later, Porter & Son wrote plaintiff confirming the letter of defendant to the effect that they had agreed to pay the debt and offering to give a four months' note drawing interest at the rate of six per cent. March 30, 1914, plaintiff replied, offering to put the account into two seven per cent. notes, dated January 1, 1914, one for half, payable May 1, 1914, and the other for half, payable July 1, 1914, and inclosed two forms for notes to be used in case of the proposition being accepted. The instruments included an agreement to pay exchange and collection charges and, that, in case of any change taking place in the ownership of the payors' business, or their stock of goods being damaged by fire, or their becoming insolvent, or failing to pay any other

indebtedness to the payee at maturity, or being sued by any other creditor, or placing a chattel mortgage on their stock, the payee might declare the debt due. Porter & Son accepted plaintiff's proposition and it duly received and accepted the notes and placed the amount thereof to the credit of Porter & Son. Some little time thereafter, plaintiff informed defendant that Porter & Son had tendered the notes in payment of the account and that in case of such notes being paid, he would be released, but not otherwise.

The trial court found that notes were given for the indebtedness in question as above indicated and that they were given by Porter & Son to carry out their agreement to assume defendant's debt to plaintiff in consideration of his transfer of stock to them; but found that plaintiff did not agree to accept the payors as its debtors in place of defendant, that the notes were credited to Porter & Son without the knowledge or consent of defendant; that they were not accepted in payment of defendant's obligation; that they were not supported by any consideration; that on the trial they were surrendered for cancellation, and that the indebtedness claimed by plaintiff was due from and payable by defendant. Judgment was ordered accordingly.

For the appellant there was a brief by *J. R. Mathews* and *R. E. Bundy,* and oral argument by *Mr. Bundy* and *Mr. S. G. Gilman.*

H. H. Dean, for the respondent.

MARSHALL, J. The following propositions are presented for consideration in this case: First, was there a novation shown by the evidence,—Porter & Son being substituted in place of appellant as respondent's debtors? Second, if the first proposition must be answered in the negative, Porter & Son and appellant having become principal and surety in respect to the indebtedness, did respondent and Porter & Son make a binding agreement, extending the time of payment of

the indebtedness without the consent of appellant and thereby discharge him? The conclusion we have reached on the first proposition renders consideration of the second unnecessary, and also consideration unnecessary of some alleged errors in the findings which are claimed by respondent and to which our attention is called by a notice under ch. 219, Laws 1915.

The essentials of a novation are a mutual agreement between a debtor, his creditor, and a third person by which such third person agrees to be substituted for such debtor and the creditor assents thereto, extinguishing the obligation of such debtor to such creditor and creating one in place thereof of such third person to such creditor. *Hemenway v. Beecher,* 139 Wis. 399, 121 N. W. 150.

There is no controversy here but that all the suggested essentials were shown by the evidence and found to exist except the assent of respondent to accept Porter & Son in place of appellant, and that such assent was not proved unless circumstantially.

It is not necessary to a substitution of debtors that the assent of the creditor to take a new debtor in place of the old one should be given by any writing or by express words. The fact is the vital thing. If that appears clearly by circumstances and the other essentials also appear, they establish a novation. If the trial court thought otherwise and so reached the conclusion that respondent did not agree to accept Porter & Son in place of appellant, error was committed. The following authorities, of many which might be cited, leave no doubt on that point: *Bishop-Babcock-Becker Co. v. Keeley,* 160 Wis. 546, 152 N. W. 189; *Hard v. Burton,* 62 Vt. 314, 20 Atl. 269; *Walker v. Wood,* 170 Ill. 463, 48 N. E. 919; *Warren v. Batchelder,* 15 N. H. 129; *J. H. Lane & Co. v. United O. C. Co.* 103 App. Div. 378, 92 N. Y. Supp. 1061; *De Witt v. Monjo,* 46 App. Div. 533, 61 N. Y. Supp. 1046. They are to the effect that assent of the creditor to a substitu-

tion may be shown by circumstances and the conduct of the parties the same as other facts may similarly be proved.

In the light of the foregoing, we will refer briefly to the characterizing circumstances and conduct in this case. As indicated by the statement, respondent was fully informed that Porter & Son had purchased appellant's store business and merchandise and agreed to pay the latter's debt to respondent and become substituted in his place as debtor. Respondent must have known, when Porter & Son requested time to pay the debt and to have their four months six per cent. note taken therefor, that they were endeavoring to carry out their agreement to become substituted. With that knowledge, respondent dealt with them without a suggestion of objection to the desired substitution, making the counter proposition for an extension of time for paying the debt, which included material advantages over permitting it to stand on mere open account. Those advantages consisted of obtaining the notes, the agreement to pay exchange and collection charges, and provisions for security against the payors' defaulting on any other indebtedness which existed or might arise in the business transactions between the parties; indicating a desire to have, and expectation of having, the payors as customers for further purchases of goods. In the letter containing the counter proposition, respondent expressed a willingness "to put the account into two notes" of the kind suggested, saying that the interest rate required "is the lowest rate any of our trade have ever asked us to accept and we believe after further consideration you will feel that this proposition is a very liberal one on our part. Assuming that this will be satisfactory to you, we are inclosing you two notes which we would thank you to sign and return at your earliest convenience. Hoping you are being favored with a satisfactory business and that we may hear from you frequently, we remain," etc. That indicates, pretty clearly, that respondent treated the account as an indebtedness of Porter & Son, and contemplated that all further busi-

ness in respect to the matter could be with them in connection with other business. Respondent replied to the letter in which the notes were sent saying that such notes had been placed to the credit of the senders, in harmony with the idea that they were sent and accepted in settlement of appellant's indebtedness. The testimony on behalf of Porter & Son was to the effect that they were so sent, and the letter written some time afterwards to appellant, so acknowledging, is in like harmony. Respondent did not notify Porter & Son that the notes were not accepted for the purpose it knew they were sent, but kept them and gave the latter the significant information that the obligations had been passed to their credit.

The foregoing seems to make a very strong case against respondent. The circumstances, in the whole, are all consistent with the theory that it assented to the substitution of new payors for the old one, and took the notes and gave the credit to fully consummate the matter, and seem to rebut any other theory. If the minds of the parties thus met, a novation occurred and was not affected by the circumstance that, some time afterwards, respondent wrote appellant that he would not be released unless the notes were paid.

Thus it is considered that the assent of respondent to take Porter & Son as substitute debtors for appellant was circumstantially established. Either the trial court did not give due weight to the circumstances which, in the particular instance, as is often the case, speak quite as plainly, if not plainer, than words, or entertained the idea that the essential of assent could not be thus established. Therefore the judgment must be reversed.

We find nothing in the cases referred to in the circuit judge's reasons for his conclusion inconsistent with what we have said. *Willow River L. Co. v. Luger F. Co.* 102 Wis. 636, 78 N. W. 762, did not deal with the subject of novation but that of whether the mere taking of the note of a third party for an indebtedness extinguishes it. Neither did

Lowry v. Milwaukee Nat. Bank, 114 Wis. 311, 90 N. W. 178, deal with novation but with whether the taking of a new for an old one extinguished the indebtedness represented by the latter. Neither did *Grubbe v. Pierce,* 156 Wis. 29, 145 N. W. 207, deal with novation; but whether the agreement by a creditor to take one member of a firm as his debtor in place of all required to be supported by a consideration to the creditor for doing so.

By the Court.—The judgment is reversed, and the cause remanded with directions to render judgment in favor of the defendant.

KERWIN, J., dissents.

DITBERNER, Respondent, vs. BESS, Appellant.

April 14—May 2, 1916.

Vendor and purchaser of land: Fraud: Estoppel: Resale: Foreclosure of contract: Equity: Rights of original vendee: Liens: Parties.

1. One G., who had an interest in land, agreed to procure the title of the other owners and convey to plaintiff for $2,000. Plaintiff paid $50 down, also paid off a mortgage of $258 owing by G., and took possession. Afterwards defendant contracted to purchase the land from plaintiff for $2,500, paid $50 down, and agreed to pay $750 in one month and give a mortgage for the remainder. Plaintiff turned over the possession to defendant. Thereafter, by collusion with G., defendant purchased and got conveyances of the land from G. and the other owners for $2,100. Defendant having defaulted on his contract with plaintiff, the latter sued to foreclose that contract. *Held* that, by conveying to defendant, G. and the other owners had estopped themselves from claiming any purchase money from plaintiff under his contract with G., and that plaintiff, being relieved from that obligation, was not entitled to strict foreclosure or recovery of the full contract price against defendant, but was entitled to enforce against defendant and the land an equitable claim for the amounts

($308) paid out by him, and also the amount ($500) which defendant was to pay to plaintiff over and above what plaintiff was to pay to G., less the $50 which defendant had already paid to plaintiff.

2. On reversal, in such case, of a judgment of foreclosure and for the full purchase price under the contract between plaintiff and defendant, plaintiff is allowed to bring in as parties any persons claiming liens on the land under the defendant, and also to bring in G. as being a joint wrongdoer with the defendant in an attempt to defraud the plaintiff.

APPEAL from a judgment of the circuit court for Buffalo county: GEORGE THOMPSON, Circuit Judge. *Reversed.*

This is an action to foreclose a land contract for the purchase of certain lands by defendant from plaintiff. Defendant defaulted in making payments of the purchase price as the contract provided.

The land in question was owned by Peter Guler and his seven children. After some negotiations between plaintiff and Peter Guler and the children, Guler agreed to procure the title and sell the land to plaintiff for $2,000. The parties engaged an attorney to have the necessary papers drawn up, and upon learning that it would take some time to get the clear title from the children an agreement was signed by Peter Guler whereby he acknowledged payment of $50 and agreed to procure good title for *Ditberner.* The payment of the balance of the purchase price was also agreed upon in this contract. Some of the children executed the necessary deeds and left them with the attorney. The defendant, who had some furniture stored in the house, turned the keys over to plaintiff and plaintiff took possession. The plaintiff planted the land to corn and cared for it up to the time he surrendered possession to defendant. The defendant, *Bess,* negotiated with the plaintiff for the purchase of the land, and on June 17, 1914, signed a written agreement to purchase it at the price of $2,500. The plaintiff and *Bess* consulted the attorney who was acting for plaintiff and Peter Guler, to have the necessary papers prepared. The attorney ex-

plained to them that the plaintiff could not then give a clear title, as the Guler children had not all deeded their interests to him. A memorandum of the agreement of sale was drawn up and signed by plaintiff and $50 was paid him by the defendant. This memorandum provided for the payment of $750 on July 1, 1914, and the giving of a first mortgage to plaintiff to secure the balance of the purchase price. Plaintiff turned over possession of the place to defendant after this contract was executed. Soon after this Peter Guler went to plaintiff's attorney and told him to do nothing more in regard to his sale because he was not going to carry out his original agreement with the plaintiff. Peter Guler and defendant colluded to ignore their contracts with the plaintiff and that Peter Guler should sell the land to defendant at the price of $2,100, which was $400 less than defendant had agreed to pay plaintiff for it. The defendant procured deeds from Peter Guler and all his children, who had an interest in the land, and had them recorded. About the 1st day of July plaintiff demanded payment of defendant under his contract and stated that he was ready to close the deal. Defendant refused to pay plaintiff and also refused to give plaintiff the possession of the land upon plaintiff's tender to return the $50 he had received from defendant.

The defendant alleges that the plaintiff was acting as his agent in the original purchase from Peter Guler and had falsely represented the price to him and had fraudulently taken the contract with Peter Guler in his own name. Further, that plaintiff had falsely and fraudulently induced the defendant to enter into the contract here involved and to pay the sum of $50, and by way of counterclaim defendant asks to recover the $50 so paid.

The trial court found that plaintiff was not guilty of any fraud in the transaction, as alleged by defendant, and entered judgment to the effect that the defendant be barred from all right, lien, claim, interest, or equity of redemption in the

land if he did not pay to plaintiff within thirty days from the time of the service of a copy of this judgment on him or his attorney the sum of $750 with interest, together with the costs and disbursements of the action, and execute and deliver to plaintiff a first mortgage on the premises to secure the sum of $1,700, payable in annual instalments of at least $100 each, with interest thereon at the rate of six per cent. per annum from July 1, 1914, as stated in the agreement. From such judgment this appeal is taken.

M. L. Fugina, for the appellant.

S. G. Gilman, for the respondent.

SIEBECKER, J. The judgment awarded goes upon the ground that plaintiff is entitled to recover the purchase price of the farm under the land contract between himself and defendant, and in default of the payment thereof to have the title to the premises transferred to him from defendant. As appears from the foregoing statement, the plaintiff had not the title to the land when he contracted with defendant to convey title upon the conditions expressed in the contract, and he is not capable of conveying the title of the premises to defendant pursuant to his contract because Peter Guler has disabled himself to acquire title thereto for plaintiff as required by his contract with plaintiff. It also appears that defendant has acquired title to the premises by conveyances from Peter Guler and his children and that this is the title plaintiff contracted to acquire and convey to defendant. The Gulers by their conveyance of the premises to defendant have estopped themselves from claiming any right to any of the purchase money from the plaintiff under his contract with Peter Guler for the conveyance of the premises. They must look to defendant for the purchase price of the farm. The result of these transactions is that defendant has the title to the premises which plaintiff promised to acquire for him and that plaintiff is relieved from his obligations under his con-

tract with Peter Guler. Plaintiff, however, has a right to enforce whatever claim he has against defendant arising out of their contract for the sale and conveyance of the premises. Since the defendant's transaction with the Gulers relieved plaintiff from paying them the balance due on the Peter Guler contract, equity demands that the defendant receive the benefit thereof to discharge his obligations under the contract with plaintiff. It appears that the plaintiff had paid Peter Guler $50 as part payment of the $2,000 purchase price of the farm. Plaintiff also paid a $258 mortgage on the farm owing by Peter Guler. These two payments total $308. The plaintiff was also entitled to receive from the defendant the amount which defendant agreed to pay plaintiff for the farm over and above the amount plaintiff agreed to pay Guler, namely, $450, in addition to the $50 defendant paid plaintiff when the contract was signed. The plaintiff's equitable claim and interest in the land arising out of these transactions therefore amounts to $758, and he has an equitable claim on the premises for this amount and for his costs in the action. From this it follows that the court erred in awarding plaintiff a judgment for the full contract price defendant agreed to pay plaintiff for the premises, and also erred in awarding a strict foreclosure of all of defendant's interest and title that he had acquired from a source other than plaintiff in default of the payment of the full $2,500 purchase price. The result of the decree would be to transfer to plaintiff a title and interest in the land he never owned and which he under the circumstances could not acquire. True, he had a contract right to acquire title to the premises from Peter Guler, but Peter Guler defaulted in securing title for plaintiff as he had agreed, and plaintiff had no legal grounds to compel the Guler children to deed to him. The defendant purchased the premises directly from Peter Guler and children, but this transfer does not operate to confer on plaintiff the right to have such title and interest transferred to him

upon defendant's default under his contract with plaintiff. The only right plaintiff has under his contract of the sale of the premises to defendant is to enforce his equitable interest in the premises to the extent of the amount he has invested in the land, which is, as above shown, the sum of $758. This interest arises out of his contracts with Peter Guler and the defendant and under the purchase or payment of the Guler mortgage.

Plaintiff's rights against defendant for his claim can be secured by a judgment awarding him an equitable interest by way of a judgment lien on the premises to this amount, and, in case defendant defaults in paying it, directing a foreclosure and sale of the defendant's interest in the land and applying the proceeds of such sale in satisfaction of plaintiff's claim and the costs he incurred to enforce his rights. It also appears by the evidence that the defendant, *Bess,* had not the cash to purchase this land and that he intended in case of purchase to mortgage it or otherwise convey the title to secure the money to pay the purchase price. The record does not disclose what has been done in this regard. There is evidence tending to show that Peter Guler colluded with defendant to defraud plaintiff out of the $500 the defendant agreed to pay plaintiff for the land above the amount the plaintiff agreed to pay Peter Guler for securing and conveying a clear title thereof to plaintiff. It cannot be determined from the record whether plaintiff can be protected as against others who may have obtained liens on defendant's interests. In view of the fact that the judgment appealed from must be reversed, the plaintiff may desire to have others claiming liens, if any exist, made parties to this action and have their rights determined and declared. The plaintiff may also, if he is so disposed, ask to have Peter Guler, apparently a financially responsible person, made a party to this action upon the theory that he is a joint wrongdoer with defendant to defraud plaintiff of his rights to and interest in the lands, so as

to enable plaintiff to seek satisfaction of his demands by securing judgment against both *Bess* and Peter Guler. In the light of these conditions we consider it appropriate that this court should not enter a final judgment upon the record, but that the case should be remanded to the circuit court for such further proceedings as the parties may deem proper and as the court may find just and conformable to law.

By the Court.—The judgment appealed from is reversed, and the cause is remanded to the circuit court with direction for further proceeding as indicated in this opinion, conformable to law.

NATIONAL LIFE INSURANCE COMPANY OF THE UNITED STATES OF AMERICA vs. BRAUTIGAM and another, Appellants, and KELLER, Respondent.

October 28—November 16, 1915.
April 15—May 2, 1916.

Life insurance: Right to change beneficiary: Married women.

Sec. 2347, Stats. 1913, relating to the rights of a married woman who is the beneficiary of a life insurance policy, permits the insured, where the right to change the beneficiary is reserved, to change the beneficiary, though a married woman, in conformity with the terms of the reservation. *Hilliard v. Wis. L. Ins. Co.* 137 Wis. 208, followed.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

The deceased husband of *Elizabeth Keller* after his marriage to her made her a beneficiary in a policy previously made payable to his estate or to such beneficiary as he might designate. The written request for and consent to such change contained this provision:

"The insured hereby reserves and is hereby granted the right, provided this policy has not been assigned, to change

the beneficiary or beneficiaries at any time during the continuance of the same, by filing with the company a written request to such effect, such change to take effect upon indorsement of the same upon the policy by the company."

Subsequently he, with the consent of the company, again made the policy payable to his estate, and later also, with the consent of the company, he made it payable to *Freda Brautigam* and *Amanda Keller,* children by a former marriage, and defendants herein. The last two changes of beneficiaries were made without the consent of his wife. The policy was a Wisconsin contract. Upon the death of her husband both the widow and the children mentioned claimed the policy. Upon motion of plaintiff it was allowed to pay the amount of the policy into court and the defendants were interpleaded. The court held that the changes of beneficiary made after the wife was made a beneficiary were void under sec. 2347, Stats. 1913, which reads:

"Any married woman may, in her own name or in the name of a third person as her trustee, with his assent, cause to be insured for her sole use the life of her husband, son or other person for any definite period or for the natural life of such person; and any person, whether her husband or not effecting any insurance on his own life or on the life of another may cause the same to be made payable or assign the policy to a married woman or to any person in trust for her or her benefit; and every such policy, when expressed to be for the benefit of or assigned or made payable to any married woman or any such trustee, shall be the sole and separate property of such married woman and shall inure to her separate use and benefit and that of her children, and in case of her surviving the period or term of such policy the amount of the insurance shall be payable to her or her trustee for her own use and benefit, free from the control, disposition or claims of her husband and of the person effecting or assigning such insurance and from the claims of their respective representatives and creditors."

And it adjudged that the widow was entitled to the policy. From a judgment entered accordingly the defendants *Freda Brautigam* and *Amanda Keller* appealed.

J. O. Carbys, for the appellants.

For the respondent there was a brief by *Rubin, Fawcett & Dutcher,* attorneys, and *Paul R. Newcomb,* of counsel, and oral argument by *Mr. Newcomb.*

The following opinion was filed November 16, 1915:

VINJE, J. In *Ellison v. Straw,* 116 Wis. 207, 92 N. W. 1094, it was stated that sec. 2347, Stats. 1898, prevented a married woman who was made a beneficiary in an insurance policy either singly or together with the insured from assigning the policy. In *Canterbury v. Northwestern M. L. Ins. Co.* 124 Wis. 169, 102 N. W. 1096, the statement was withdrawn, and it was held that both could jointly assign it either before or after the passage of ch. 376, Laws 1891. In *Boehmer v. Kalk,* 155 Wis. 156, 144 N. W. 182, it was held that said chapter was not retroactive and hence it did not prevent the insured from changing the beneficiary in a policy issued before the chapter was enacted, though such beneficiary was a married woman.

In *Allen v. Cent. Wis. T. Co.* 143 Wis. 381, 127 N. W. 1003, the precise question here presented arose, namely, Can the insured under our present statute change the beneficiary, where she is a married woman, without her consent, in a policy reserving, with the consent of the company, such right? In that case it did not become necessary to decide it, and the question was expressly reserved for future determination.

The case of *Hilliard v. Wis. L. Ins. Co.* 137 Wis. 208, 117 N. W. 999, is specially relied upon as requiring an affirmative answer to the question. In that case the question arose whether the insured could cancel the policy and receive its surrender value, the beneficiary being a married woman. The policy contained this proviso: "It is understood that in the event of the surrender of this policy the beneficiary hereunder shall have no claim whatever upon said company," and it was held that it did not come under the statute, and that it was competent to make such a proviso. Without casting any

doubt upon the correctness of the decision in that case it is deemed best that the rule announced should not extend to a case where the policy has matured through the death of the insured. To so extend it would be to practically emasculate the statute, for its provisions could always be nullified by a reservation and consent in the policy of the right to change the beneficiary. Sec. 2347 deals primarily with the rights of married women to benefits accruing under policies matured through the death of the insured. As to such benefits, they having once been legally made beneficiaries, the statute prevents their rights therein from being divested without their consent. It is quite evident from the different amendments to the statute discussed in the first two cases mentioned above that it was the legislative intent to prevent a married woman once made a beneficiary from being defeated, without her consent, of her rights as such in a matured policy. It may be quite a debatable question whether such a statute will ultimately inure to the advantage of married women because of its tendency to discourage their being made a beneficiary at all. But that is a legislative, not a judicial, question. Construing our present statute in the light of its history, it seems quite plain that it was intended to make the right of a married woman absolute once it attached and the policy was permitted to mature. The circuit court, therefore, properly held the widow entitled to the policy.

By the Court.—Judgment affirmed.

SIEBECKER, J., does not concur.

The appellants moved for a rehearing.

In support of the motion there was a brief by *J. O. Carbys,* attorney for appellants, and *Miller, Mack & Fairchild,* of counsel.

In opposition thereto there was a brief by *Rubin, Fawcett & Dutcher,* attorneys for respondent, and *Paul R. Newcomb,* of counsel.

The motion was granted on February 1, 1916, and the cause was reargued on April 15, 1916:

For the appellants there was a brief by *J. O. Carbys,* attorney, and *Miller, Mack & Fairchild,* of counsel, and oral argument by *Mr. Edwin S. Mack, Mr. J. G. Hardgrove,* and *Mr. Carbys.*

For the respondent there was a brief by *Rubin, Fawcett & Dutcher,* attorneys, and *Paul R. Newcomb,* of counsel, and oral argument by *Mr. Newcomb.*

A brief was also filed on behalf of the Northwestern Mutual Life Insurance Company by *Joseph R. Dyer* and *Olin, Butler, Stebbins & Stroud.*

The following opinion was filed May 2, 1916:

VINJE, J. Upon a reconsideration of the questions involved in the case at bar and a re-study of the principle of law announced in the case of *Hilliard v. Wis. L. Ins. Co.* 137 Wis. 208, 117 N. W. 999, we have reached the conclusion that the latter case logically governs this case; that the rule of the *Hilliard Case* should be adhered to; and that sec. 2347, Stats. 1915, should be held to permit the insured, where the right to change the beneficiary is reserved, to change the beneficiary though a married woman, in conformity with the terms of the reservation, but not otherwise.

As suggested in the former opinion, such construction will probably inure as much to the benefit of married women as the one first given the statute, and will, we are advised, protect a large number of contracts made with the understanding that a married woman could conditionally be made a beneficiary.

By the Court.—The judgment heretofore entered by this court is vacated, and the judgment of the circuit court is reversed and the cause remanded with directions to enter judgment in favor of *Freda Brautigam* and *Amanda Keller,* the appellants.

WILL OF BARRON.

November 20, 1915—May 23, 1916.

Trusts and trustees: "Income" and "corpus" *of trust estate: Division of profits: Increase in value: Insurance moneys: Dividends on corporate stock: Purchase and resale of property: Interest accrued at death of* cestui que trust: *Dividends afterwards declared.*

1. The surplus and undivided profits of a corporation, existing at the time of the death of a stockholder, belong to the *corpus* of his estate rather than to a person who, under a trust devise in his will, becomes entitled to the income and increase of the estate.
2. A division of the profits of the corporation for the year during which the stockholder died, and payment of the part deemed to have accrued before his death to the *corpus* and the remainder to the person entitled to the income of the trust estate, was a matter which might be agreed upon and settled by the parties interested.
3. The so-called unearned increment, or increase in the value of the property constituting the *corpus* of the trust estate, and also any insurance money received in excess of the cost of repairs on a building damaged by fire, belonged to the *corpus*.
4. Where the trustees, after having purchased corporate shares as part of the trust estate, became entitled, as holders thereof, to subscribe for additional shares and sold such right, the amount received for that right must be treated as ordinary profit on investment, in the absence of evidence furnishing sufficient data for a division thereof between *corpus* and income.
5. An extra cash dividend on corporate shares held by the trustees belonged to the income and not to the *corpus*, even though the trustees used it as part payment for additional shares in the same corporation.
6. Where trustees, who hold property of which the income and increase is to be paid to a beneficiary during his life, have a power of sale and reinvestment, the *corpus* of the trust estate at any given time consists of (1) the identical property which was put into the *corpus* by the creator of the trust and still remains on hand, plus (2), to balance any money which originally went into the *corpus*, a like amount of money or property of value equal to such original amount of money, plus (3), if any of the property which originally went to make the *corpus* has been sold, money in amount, or property in value, equal to that part of the

original *corpus* sold plus the net amount of natural or unearned increment up to that time actually realized upon the property sold which was originally part of the *corpus*.

7. Where in such a case the trustees have purchased and resold property, the profits realized should be divided by assigning to the *corpus* whatever is necessary to make good any losses thereof and keep it at the proper amount under the rule last above stated, and by paying out the remainder as income.

8. Dividends declared after the death of the life beneficiary upon corporate shares held by the trustees were not income until so declared, and hence did not belong to such beneficiary; but the interest which had accrued upon ordinary loans on securities up to the time of his death, though not payable until thereafter, properly belonged to his estate.

APPEALS from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Modified and affirmed.*

All the parties appeal.

For the complainant, *Hannah S. Barron,* as executrix of the will of Charles H. Barron, there were briefs by *McConnell & Schweizer,* and oral argument by *C. H. Schweizer.*

For the defendants *George W. Burton* and *Alfred James,* as trustees of the estate of Edwin R. Barron, there was a brief by *George H. Gordon, Law & Gordon,* and oral argument by *George H. Gordon.*

The following opinion was filed January 11, 1916:

TIMLIN, J. This suit is by the executrix of a life beneficiary of the "income and increase," against trustees, to recover items which it is claimed should have been paid over to the life beneficiary. Edwin R. Barron died March 23, 1897, testate. After some bequests he devised the residue of his estate to two of his executors in trust to pay the rents, income, and increase thereof to testator's brother, the third executor, during the life of the latter, and at the demise of his said brother to other designated beneficiaries during life, the trust to be closed and the property distributed at the death of two of the latter. The trustees had power of sale, investment,

and reinvestment. On March 9, 1898, the final account of the executors was allowed and they were discharged and the trustees' liability began. The two executors who were not beneficiaries were the first trustees. On August 4, 1910, the beneficiary, C. H. Barron, died. The evidence is quite meager on all points. It appeared, however, that the testator owned 400 out of 650 shares in the E. R. Barron Co., a corporation, and also owned the real estate hereinafter mentioned. The appraised value of the *corpus* of the estate turned over to the trustees was $122,960.62. Some of the property so turned over brought on resale in excess of the inventoried value as follows: Real estate, $4,500; shares of the E. R. Barron Co. sold, $10,125. There was also $666.11 collected from fire insurance companies for loss on building situated on this real estate over and above the amount spent in repair. The total increment of this kind was $15,291.11. If this were added to the original appraisal it would make a total *corpus* of $138,251.73. As near as can be ascertained, at the death of the beneficiary, C. H. Barron, the trust estate inventoried $140,171.66. In this, however, was included profit of $999.50 on United States bonds bought by the trustees and resold; profit on similar purchases of Batavia Bank stock of $825; dividend on Northwestern Bank stock, $880; sale of rights of stockholders to subscribe for stock, $341.66; profit on shares of E. R. Barron Co. purchased and resold by trustees, $14,137.50. These profits, exclusive of the $880 dividend, amounted to $16,303.66, and if they are subtracted from the value of the trust estate at about the time of the death of the first beneficiary it would leave that trust estate $123,868. If all these profits last mentioned go to income and the natural increment or increase belongs to the *corpus,* there would be a loss on that *corpus* of $14,383.73. If the natural increment or increase of property which originally formed part of the *corpus* of the trust estate and the profits made by the trustees, together amounting to $31,594.77, be subtracted from the present value of the trust estate, it will

leave $108,576.89, and show that without the increment and profits above mentioned there must have been losses of the *corpus* of the trust estate to the amount of $14,383.73. The following items are in controversy in this case:

Item 1. $3,663.52. Forty sixty-fifths of the total profits of the E. R. Barron Co. for the year 1897 were $12,974.47. The executors in and by their final account which was allowed, computed or estimated that of the total profits of that corporation for that year $3,663.52 accrued prior to the death of the testator, and after deducting this last sum the corporation declared and paid a dividend of the remainder of the profits. This dividend went to income and was paid over to the beneficiary. At the end of the next fiscal year of the corporation it declared and paid one dividend out of the profits of the last mentioned year, the trustees' share of which went to income, and another dividend including all the surplus and undivided profits which were accumulated prior to the death of the testator, including the item above mentioned of $3,663.52. The trustees' share of this last dividend was added by them to *corpus*. This division for the year 1897 of profits before, and those made after, testator's death was agreed upon. The adult beneficiary as one of the executors agreed to this, reported it to the county court, and acquiesced in that agreement for more than twelve years, and, acting with the other executors, procured an order of the county court discharging the executors and turning this item with the *corpus* over to the trustees. This item was properly disallowed by the circuit court. The surplus of a corporation not declared as a dividend cannot be treated as income until it is declared as a dividend, for the obvious reason that what is surplus one year may be swept away by losses the next year. It is a fluctuating quantity. Surplus and undivided profits of a corporation, existing at the time of the death of the testator who is a stockholder, go into the *corpus* of the trust estate. This division of the profits of the year 1897 and the payment

of part thereof to the beneficiary and part to the *corpus* of the trust estate was something which might be agreed upon and settled between the interested parties, and, as we have seen, such settlement was made. The division was in line with *Miller v. Payne,* 150 Wis. 354, 136 N. W. 811. The parties were competent to contract on this subject. *Matter of Leask,* 159 App. Div. 102, 143 N. Y. Supp. 865.

Items 2, 3, and 4. $4,500, $10,125, and $666.11 = $15,291.11. Certain real property occupied as a store and part of the *corpus* of the trust estate at the death of the testator was appraised for the trustees at $40,000 and thereafter sold by them for $44,500. Fifty shares of the capital stock of the E. R. Barron Co., part of the original *corpus,* were sold by the trustees at an advance of $10 per share over the appraised value, and 350 like shares at an advance of $27.50 per share, making a profit of $10,125. The store building aforesaid was during the administration of the trustees damaged by fire and the amount of insurance received exceeded the amount which they expended for repairs on account of said fire by $666.11. The unearned increment so called, or the increase in value of the property constituting the *corpus* of the trust estate, and the insurance received as indemnity against loss of part of that *corpus,* all belong to the latter, and these items were properly disallowed.

Items 5, 6, 7*a,* 8, and 9. $999.50, $825, $880, $315, $26.66, and $14,137.50 = $17,183.66. The trustees bought $10,000 of United States bonds and thereafter resold them at a profit of $999.50. They also bought fifteen shares of the capital stock of the Batavia National Bank and resold them at a profit of $825. This bank was organized in 1904 with a capital stock of $400,000 and a surplus of $100,000. The stock was sold during the year 1909. The only evidence affecting this question which we find is that it had in 1909 undivided profits of $14,000 and in 1910 of $22,000. About October 16, 1900, the trustees purchased forty-four shares of

the capital stock of the Northwestern National Bank of Minneapolis for $6,600, or $150 per share. The par value of these shares was $100 each. The trustees received thereafter regular quarterly dividends of two and one-half per cent. on said stock, which were paid over to the beneficiary in his lifetime. On or about June 30, 1908, the bank declared and paid an extra dividend of twenty per cent. on the stock, amounting to $880. The surplus and undivided profits of this bank on January 1, 1900, amounted to $421,388.71; on June 30, 1908, $1,242,071.87. The quarterly dividend on the date last mentioned of $25,000 and a special twenty per cent. dividend of $200,000 left the surplus and undivided profits on July 1, 1908, $1,017,071.87. The trustees as owners of these forty-four shares were entitled to subscribe to a proportion of shares in an increase of capitalization of said bank then consummated. The number of shares is not shown. They sold their right for $315 and received this money. There is no showing what was the amount of the increase of the capital stock or whether it took in all the surplus and undivided profits which existed on July 1, 1908, including the surplus and undivided profits of $421,388.71 which existed at the time the purchase of shares was made; or whether it did not. There is no evidence showing the cost of the new shares. Ordinarily this $315 should be divided between *corpus* and income in the proportion of 421,388 to 595,683 (omitting fractions), but the plaintiff has furnished in this case no sufficient data upon which to make the division, so we treat it as ordinary profit on investment by the trustees. *Stokes's Estate,* 240 Pa. St. 277, 87 Atl. 971; *Holbrook v. Holbrook,* 74 N. H. 201, 66 Atl. 124. The trustees having invested a part of the trust funds in the stock of the Continental and Commercial National Bank of Chicago, Illinois, and that bank having increased its capital stock, they sold their right to subscribe for their proportion of the increased stock and received on such sale the sum of $26.66.

It is not shown whether this bank had any surplus or undivided profits or the amount of its original stock or the amount of the increase. On purchases and resales by them during their term of 377 shares of the capital stock of the E. R. Barron Co. the trustees realized a profit of $14,137.50. This company during this time paid out in dividends each year all its profits for the year.

Of this group of items the circuit court allowed to the plaintiff, as representative of the deceased entitled to the income for life, only the item of $880 above mentioned. That item was clearly a cash dividend and belonged to the income notwithstanding the trustees added $120 to it and applied it on the purchase of additional shares of stock in the same bank. It was properly allowed. *Miller v. Payne, supra; Holbrook v. Holbrook, supra.* The item received for sale of rights in the Chicago bank must be presumed to represent good will or other increment to the original capital of the bank, increasing the value of the shares above the amount at which they were sold to this extent. That would be the presumption in the absence of evidence. It therefore belongs to the *corpus.*

Where the trustees have a power of sale and reinvestment the *corpus* of the trust estate at any given time consists of (1) the identical property which was put into the *corpus* by the creator of the trust and still remains on hand, plus (2), to balance any money which originally went into the *corpus,* a like amount of money or property of value equal to such original amount of money, plus (3), if any of the property which originally went to make the *corpus* has been sold, money in amount, or property in value, equal to that part of the original *corpus* sold plus the net amount of natural or unearned increment up to that time actually realized upon the property sold which was originally part of the *corpus.* This keeps the *corpus* plus its unearned increment intact except in cases of unavoidable loss of *corpus.* Profits realized on pur-

chases by the trustees and resales of the same property by them should, at the next succeeding income payment day, be divided by placing to *corpus* whatever is necessary to keep it up to the foregoing figure, thus making good losses of *corpus*. All profits upon such resales not necessary for this purpose should be paid out as income. We have no evidence informing us whether any part of the property originally forming part of the *corpus* remains on hand, but taking values shown by the evidence we have the following:

Value of original *corpus*	$122,960 62
Unearned increment actually realized on real property sold	4,500 00
Insurance money aforesaid	666 11
Same on shares in E. R. Barron Co	10,125 00
Same on sale of rights	26 66
Total *corpus* at death of beneficiary	$138,278 39
Total value of property on hand at death of beneficiary	$140,171 66
Less item of income above mentioned included	880 00
Total	$139,291 66
Total amount of profits made on their investments by trustees	$16,303 66

Of this $15,597.62 will be taken to keep the *corpus* with its lawful increment intact, and $706.04 will be carried to income. Therefore the recovery permitted by the circuit court should be increased by $706.04.

Items 10 and 11. $9,324 and $209.23. After the death of the beneficiary, Charles H. Barron, and on January 1, 1911, the directors of the E. R. Barron Co. declared a dividend, which was received by the trustees on January 10, 1911. The amount of this dividend which came to the stock of that company then in the hands of the trustees amounted to $9,324, and the dividend represented earnings for the year from January 1, 1910, to December 31, 1910. It will be remembered that the beneficiary died August 4th of that year. This dividend belonged to the next life beneficiary and not to Charles H. Barron, because, not having been declared a dividend during his life, it was not income of the trust estate received during his life and it was not apportionable. Divi-

dends on shares of corporate stock in the hands of trustees are not income until such dividends are declared by the directors of the corporation, who have a wide discretion whether to withhold or declare such dividends. Interest to the amount of $209.23 upon securities held by the trustees had accrued up to the date of the death of the beneficiary, Charles H. Barron, but was not payable until after his death. Assuming these were ordinary loans on securities, the circuit court properly allowed the plaintiff the interest accrued up to the time of the death of the beneficiary.

By the Court.—Judgment modified on plaintiff's appeal by adding to the recovery therein allowed plaintiff the sum of $706.04, with interest at six per cent. from the commencement of this action, and as so modified affirmed, and on defendants' appeal judgment affirmed, without costs in either case, except that the defendants must pay the clerk's fees.

A motion for a rehearing was denied, with $25 costs, on May 23, 1916.

PETITION OF WAUSAU INVESTMENT COMPANY and others.

December 11, 1915—May 23, 1916.

Taxation: Exemptions: Lands acquired by the state: Prior tax liens: Enforcement: When taxes are "levied:" Assessment roll, when completed: Constitutional law: Political questions: Actions against state.

1. Under sec. 1038, Stats., property owned exclusively by the state is exempt from taxation; but tax liens which have already accrued at the time the state becomes the owner do not thereupon cease to exist.
2. In sec. 1034, Stats.—providing that "taxes shall be levied upon all property in this state except such as is exempted therefrom,"—the word "levy" is not used in its strict sense.
3. Under our statutes the assessment roll is to be deemed completed, except for the correction of mistakes and clerical errors, on the

first Monday in August when, under sec. 1064, it is to be delivered to the clerk for filing; and the subsequent levy of taxes must be considered as relating back to said date.

4. Lands deeded to the state prior to the first Monday in August in any year are exempt from taxation for that year, but lands of which the state becomes owner after that date are not exempt for that year.
5. The question as to how, if at all, valid tax liens upon lands to which the state has acquired title shall be enforced as against the state is one which the legislature ought first to consider and pass upon, and it is therefore, in this case (involving lands purchased under the forest reserve legislation), left undecided until the legislature shall have had an opportunity to determine what the policy of the state should be.
6. The state cannot be sued without its consent; and sec. 3200, Stats., does not apply to equitable claims, such as the claim that the state should redeem lands acquired by it from sales thereof for taxes levied prior to such acquisition.

APPLICATION in the action of *State ex rel. Owen v. Donald* (160 Wis. 21, 151 N. W. 331). *Continued.*

The facts are stated in the opinion.

For the petitioners there was a brief by *Edgar & Johnson* and *Amos Radcliffe,* and oral argument by *C. T. Edgar.*

On behalf of *R. B. Tweedy* there was a brief by *Goggins & Brazeau,* and oral argument by *B. R. Goggins.*

On behalf of *Vilas County* there was a brief by *C. H. Weigand,* district attorney, and *Curtis, Van Doren & Cole,* of counsel, and oral argument by *George Curtis, Jr.*

For the *State* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

WINSLOW, C. J. This proceeding is an application to the court in the action of *State ex rel. Owen v. Donald* (160 Wis. 21, 151 N. W. 331), made by the *Wausau Investment Company,* the *Wisconsin Realty Company,* and *F. I. Carpenter,* holders of certificates of tax sale upon lands in *Vilas County* purchased by the state for forestry purposes and involved in

the action aforesaid (hereinafter referred to as the forestry action), asking that an order be made in that action requiring the state to redeem said tax certificates out of state funds with interest at fifteen per cent. per annum or that such other order be made with relation to the redemption of said certificates as may be equitable. Upon the filing of this petition, it appearing to the court that other persons and corporations held tax certificates upon certain of the lands involved in said forestry action and were in similar situation, it was ordered that all of such persons and corporations be made parties to the proceedings and that they be required to appear and exhibit their claims. At the same time it was ordered that the state and *Vilas County* be required to appear and make answer to the petition. Pursuant to this order the state and *Vilas County* appeared and filed answers and the other holders of tax certificates on said lands also appeared and submitted their claims to the court, without, however, waiving their claims against *Vilas County* therefor. On the part of the state the principal contention was that the lands were exempt from taxation because exclusively owned by the state and hence that the state should not be required to redeem. On the part of *Vilas County* it was claimed that on equitable principles the tax certificates should be redeemed either by the state or by the vendors of the lands.

There was no substantial dispute as to the facts and the matter was submitted upon the allegations of the petition and the various answers. In view of the conclusions which we have reached it is not deemed necessary now to attempt to make an itemized or detailed statement of the facts as to the claims made by the various petitioners, but only to state in a general way the fundamental facts essential to an understanding of the legal questions which are raised and now decided.

At various dates between the 1st day of April, 1908, and the 31st day of July, 1912, the state in form purchased from various lumbering corporations more than 90,000 acres of cut-

over lands for forestry purposes. The purchases were generally, if not universally, made in the form of land contracts, payment to be made in instalments in the future, as was the case with the lands purchased of the G. F. Sanborn Company which were directly involved in the forestry case. The Sanborn contract covers more than 25,000 acres of land. It was dated June 1, 1911, and at the time of the commencement of the forestry action all of the purchase price except the last instalment of $20,000 had been paid. That action was brought to compel the payment of this last instalment, but this court held the contract void on various grounds not necessary to be related here. The court also held in that decision that, notwithstanding the invalidity of the contract in question and all other contracts of like nature, the state possessed an equitable lien on the lands covered by the contracts for the money already paid thereon. By administrative orders since that decree, claims have been allowed and ordered to be audited and paid for the respective balances remaining unpaid on the Sanborn contract and on other similar contracts to protect the lien of the state upon the lands covered by the contract and deeds have been received by the state for such lands so paid for. So, notwithstanding the invalidity of the contracts as state obligations, the lands covered by them have largely come into the possession and ownership of the state. The forestry law provided for the taxation of the so-called forestry lands and for the payment of the taxes so assessed out of the general funds of the state; it also contained a number of special provisions restricting the powers of counties north of town 33 with regard to the taking of tax deeds upon lands. All of these provisions were held invalid by the decision in the forestry case.

It appears by the petition and answers which are now before us that there are outstanding tax certificates held by the various petitioners and respondents who have appeared in this proceeding to the amount of nearly $8,000 upon the lands

covered by the various contracts, the certificates having been issued upon the tax sales of 1912 to 1915 inclusive.

The fact appears that the greater part of the land covered by the certificates (if not all of it) is now owned by the state in fee.

Sec. 1038, Stats., provides that property owned exclusively by the United States or by this state shall be exempt from taxation. The broad claim is made on behalf of the state, under this provision, that the instant the state becomes the owner of any property the tax laws cease to affect that property no matter what stage the process of taxation may have reached, or, in other words, that if the state becomes the owner at any time before a tax deed is executed the tax becomes void. On the other hand it is claimed by *Vilas County* that the lands involved here never became the property of the state until the entry of the decree in the present action (February, 1915) and that such title did not relate back to the inception of the void contracts, consequently that the lands were not exempt from taxation when the various taxes in question were levied, and that, as between the county and the state, the state should equitably be required to redeem the tax certificates.

On behalf of the state it is suggested further that there are no funds from which any state officer is authorized to take the money to make these redemptions. On the major contention made by the state, reliance is placed on the case of *Gasaway v. Seattle,* 52 Wash. 444, 100 Pac. 991, 21 L. R. A. N. S. 68, in which it was held that under the laws of Washington where a city condemns land for public use it will obtain title free from existing tax liens. It is not necessary either to affirm or disaffirm the doctrine of that case here. Doubtless the state by virtue of its sovereign power (which of course includes complete control over taxation proceedings) could expressly or impliedly provide that all tax liens should cease upon the acquisition of the property by the state or by a municipality. We do not, however, discover any such intention

here. Our statute (sec. 1034) provides that "Taxes shall be levied upon all property in this state except such as is exempted therefrom," and then, in sec. 1038, names forty-one classes of property which are exempt, the first class being "that owned exclusively by the United States or by this state;" after this class follow the other classes, including municipal property, church and educational property, and many other kinds. Now we apprehend that no one would seriously contend that if real estate were acquired by a church or an educational institution after a tax lien had accrued thereon but before the issuance of a deed the lien would cease to exist, and yet property so acquired is made exempt by precisely the same provision as that governing the exemption of property acquired by the state. The direction of the statute is to levy taxes upon all property except that which is exempt. The question then is, When is the levy made so that a transfer thereafter does not affect the tax lien? The word "levy" here cannot, we think, be used in its strict sense. The local assessment rolls are completed (subject only to the correction of clerical errors) months before the levy of the tax by the county board in November, and the town clerk must, "upon a uniform percentage, calculate and carry out in one item opposite to each valuation in the tax roll" the amount necessary to raise the taxes levied for all purposes (sec. 1079, Stats.). If during the time between the final closing of the assessment roll and the formal levy by the county board great blocks of land like those involved in the present case could be taken from the taxable property of the town by transferring them to an exempt class, it is evident that great confusion and embarrassment would result in the transaction of the town business. The tax must be apportioned to the property listed on the completed roll, and the roll is completed, except for the correction of clerical errors, in the month of August; hence, if property can escape taxation by passing into the exempt class after completion of the roll, there would necessarily re-

sult in every such case a deficiency in the revenues of the town for that year. We do not think there was any legislative intention of this nature.

This court has not met the question before. It is true that in *Wis. Cent. R. Co. v. Lincoln Co.* 57 Wis. 137, 15 N. W. 121, it is said that lands are properly assessable if "subject to taxation at any time before the fourth Monday in June . . . , otherwise not," but the question of the exact date was not necessary to the decision in that case.

The conclusion that we now reach from examination of the taxation statutes is that the law contemplates that the assessment roll is to be completed, except for the correction of mistakes and clerical errors, on the first Monday in August when the assessor delivers the assessment roll to the town clerk for filing and preservation in his office. Sec. 1064, Stats. The assessor is required to begin the preparation of the roll on the 1st day of May. Personal property (with certain exceptions) must be assessed as of that date and no change of location or ownership thereafter affects the assessment thereof, but real property may be assessed at any time between that date and the sitting of the board of review. Sec. 1033 and sub. 8, sec. 1040. The board of review is required to sit on the last Monday of June and the assessor lays the roll before the board. Secs. 1060, 1061. This board has very complete power to hear complaints, take testimony, raise or lower assessments, correct errors, place omitted property on the roll, and in fact fully to complete the same. The statute fixes no date upon which real property is to be assessed, and in view of the very extensive powers of the board of review over the roll and the fact that it is in no sense a completed document until the board finishes its labors, we conclude that if real estate passes from the taxable class to the exempt class, or *vice versa,* at any time prior to the first Monday in August, when the roll is completed, verified by the assessor, and filed with the town clerk, it would be the duty of the board to change

the roll by striking out or adding such real estate, as the case may be. No changes in the roll are authorized to be made thereafter except such as are necessary to correct mere errors or mistakes. The inclusion therein of property then subject to taxation cannot be called an error or mistake. When the annual taxes are thereafter levied they are necessarily levied on the property *rightly* included in the roll on the first Monday in August and hence the levy must be considered as relating back to that date.

Lands which had been deeded to the state prior to the first Monday in August in any year were unquestionably owned exclusively by the state and exempt from taxation for that year, and this is so even if such lands were incumbered by a mortgage or purchase-money lien. On the other hand, lands which were not deeded to the state at that date, but were simply included in one of the void contracts of sale, were not exclusively owned by the state and cannot be held to be exempt from taxation for that year. It follows that when the state thereafter obtained title in fee to such lands the tax liens thereon were not extinguished.

These conclusions, however, do not dispose of the most serious questions presented to us in this proceeding.

If it be granted that the state took title to such lands subject to the tax lien, the question as to how that lien can be enforced as against the state, if indeed it can be enforced at all, is not easy of solution.

Can the certificate holder compel the state to execute a tax deed upon its own lands, or can he maintain an action against the state to foreclose the lien? The state cannot be sued without its own consent, and sec. 3200, Stats., authorizing action against the state where the claim has been presented to and disallowed by the legislature, applies only to claims which, if valid, render the state a debtor, and not to equitable claims or claims for tort. *Chicago, M. & St. P. R. Co. v. State,* 53

Wis. 509, 10 N. W. 560; *Houston v. State,* 98 Wis. 481, 74 N. W. 111.

It seems to us that the question what the state should do with reference to the tax liens which, under the principles hereinbefore announced, are valid liens, is pre-eminently a question which the legislative branch of the state government ought first to consider and pass upon. We have therefore concluded to make no final disposition of this proceeding at the present time. The principles of law hereinbefore announced are deemed to be finally settled in the case, but the proceeding itself will be continued and action on the part of all the tax certificate holders looking towards enforcement of their certificates in any court enjoined until the further order of the court and until such time in the year 1917 as the legislature shall have opportunity to consider the situation and determine what the policy of the state ought to be in view of the facts and the law.

It will be necessary also for the information of the court as well as of the legislature that all the facts regarding the tax certificates in question be ascertained and tabulated so that the exact situation may be known in regard to every certificate, not only as to the ownership, amount, and date thereof, but also as to the specific parcel covered by it and the condition of the title to such parcel at the time of the levy of the tax represented thereby. A reference to ascertain these facts and any other facts deemed material to the questions at issue will be ordered by the court.

By the Court.—Ordered that this proceeding be continued until further order of the court, and that all certificate holders who are parties to this proceeding be enjoined in the meantime from taking action to enforce their certificates in any court or tribunal.

STATE, Appellant, vs. GUARANTEED INVESTMENT COMPANY, Respondent.

February 3—May 23, 1916.

Petition of Wausau Investment Co., ante, p. 283, followed.

APPEAL from a judgment of the circuit court for Oneida county: A. H. REID, Circuit Judge. *Continued.*

The *Attorney General* and *J. T. Dithmar,* assistant attorney general, for the appellant.

For the respondent the cause was submitted on the brief of *L. A. Doolittle.*

WINSLOW, C. J. The state brought this action to quiet its title to ninety-one descriptions of land in Oneida county deeded to it October 31, 1907, to form a part of the so-called forest reserve. The defendant owned tax deeds on the lands executed May 21, 1911, based on the tax sale of 1908 for the taxes of 1907. The state claimed that the tax deeds were void because (1) the land was exempt from taxation in the year 1907 by reason of its transfer to the state, and (2) because of certain irregularities in the tax proceedings.

The trial court held that the land was subject to taxation, but that the tax deeds were void because of defects in the tax proceedings, and adjudged that the defendant release all claim to the lands on condition of the payment by the state within sixty days of the amounts for which the lands were sold with fifteen per cent. interest, and in case of refusal so to do ordered that the complaint be dismissed on the merits.

The defendant is satisfied with the judgment, but the state appeals and makes practically the same contentions as are made in *Petition of Wausau Investment Company, ante.* p. 283, 158 N. W. 81, namely, that the lands were exempt from taxation in 1907 and that in any event the state cannot be required to pay any sum to redeem them.

Upon the question of exemption the case is ruled against the state's contention by the decision in the case just cited. As to the contention that the state cannot be required to redeem, we think it eminently proper that the legislature be given the first opportunity to determine what the policy of the state should be. These lands are a part of the lands purchased under the forest reserve legislation, as are the lands in the *Wausau Investment Company Case,* and it seems that the two cases might very appropriately receive legislative consideration at the same time. This appeal will therefore be continued until the further order of the court in order that the legislature of 1917 may have opportunity to consider the question as to the policy of the state under such circumstances.

By the Court.—Action continued until the further order of the court.

KARAKUTZA, Plaintiff in error, vs. THE STATE, Defendant in error.

February 5—May 23, 1916.

Criminal law: Homicide: Circumstantial evidence: Sufficiency: Competency: Accessory before the fact: Trial: Statute construed: "Substantive felony:" Instructions to jury: Waiver of objections.

1. Upon a trial for murder the evidence, though wholly circumstantial, is *held* sufficient to sustain a conviction.
2. The admission in evidence in such case of Turkish gold pieces of the same denomination as certain gold pieces shown to have been in the possession of the murdered man, and of a pistol of the same caliber as that with which he was shot,—all of which were found in defendant's room on the day following the murder,—was proper.
3. Under our statute (secs. 4613–4615, Stats. 1915) an accessory before the fact must still be prosecuted as such; but it is not essential to his conviction that the principal felon be prosecuted or convicted, it being sufficient that the guilt of the principal felon be proved. The words "substantive felony" in sec. 4614

do not mean the principal felony, but merely a felony not dependent on the conviction of another person for another crime.

4. At the trial upon an information charging murder only it was error to instruct the jury upon the subject of an accessory; but no objection having been made at the time on behalf of defendant, and the court, in connection with its charge on that subject, having given an instruction requested by defendant's counsel which practically covered the same ground, any objection to the charge must be deemed to have been waived and the conviction is affirmed. If, however, there were grave doubt as to defendant's guilt there might be a reversal notwithstanding such waiver.

ERROR to review a judgment of the municipal court of Milwaukee county: A. C. BACKUS, Judge. *Affirmed.*

The information in this case contained one count charging murder in the first degree, the verdict was guilty, and the plaintiff in error (hereinafter called the defendant) was sentenced to life imprisonment, and brings his writ of error to reverse the judgment. The evidence was purely circumstantial. Horan Jarakain, an Armenian doctor living in Milwaukee, was murdered during the night of March 16, 1914, and his body was found pierced with three bullet wounds at 2:30 p. m. on the following day in a narrow field between the electric railway track and the Chicago & Northwestern Railway track in the town of Lake, Milwaukee county, south of the village of St. Francis and about 600 feet south of an old flag station of the latter railroad. The defendant is a Greek who then conducted a boarding house at Cudahy. He was in Milwaukee on the 16th of March aforesaid, and was in the company of one Julius Otto, a relative by marriage. In the evening of that day defendant and Otto called on the deceased at his boarding house and stayed until about 11:30 o'clock, when the three went out and boarded an electric interurban car bound for South Milwaukee. The conductor of the car testified that the defendant got off the car at about 11:50 o'clock at a crossing about 500 feet north of the flag station and that the other two got off at the flag station, about

three quarters of a mile from the Cudahy depot. The defendant contended that he got off the car at the Cudahy station and went immediately home. Defendant was arrested on the following day and was found to have in his room a number of Turkish gold pieces of the same denomination as certain gold pieces shown to have been in the possession of Jarakain, also a pistol. There was evidence tending to show that the pistol was of the same caliber as that with which the deceased was shot. Apparently Otto disappeared and was never arrested. The defendant after his arrest told four different stories, in the first of which he denied that he even knew Jarakain. The case was originally submitted to the jury on the issue whether or not the defendant was guilty of the crime of murder, nothing being said about any possible conviction as an accessory. The jury after being out several hours were brought into court at their own request and asked for instructions on accessory, whereupon the following proceedings were had:

Court: "An accessory before the fact is one who procures, commands, or counsels the commission of a felony by another, but who is not present either actually or constructively when the felony is committed. To constitute one an accessory before the fact there must be a principal guilty of the felony and there must be some participation in the offense by the accessory by way of procurement, command, or counsel."

A Juror: "I do not understand that last word there, 'counsel.' Does that mean conversation to that effect?"

By the Court: "One who counsels with another."

Juror: "That means talking about it, consulting?"

Court: "I will give you the definition of the word 'counsel.' Counsel is defined as 'an interchange of opinions, mutual advising.' "

Juror: "What form of verdict are we to bring in if we find this man is an accessory?"

Court: "I will read you the statute. 'Every person who shall be aiding in the commission of any offense which shall be a felony or who shall be accessory thereto before the fact by counseling, hiring or otherwise procuring such felony to be

committed, shall be punished in the same manner as is, or shall be, prescribed by law for the punishment of the principal felon.' Counsel for the defendant has requested the court, in addition to the definition of accessory, to state to the jury 'that before you can find the defendant guilty of being an accessory, you must be convinced beyond a reasonable doubt that the defendant commanded, counseled, or procured the commission of the felony by another.' Does that cover your request, Judge Neelen?"

Mr. Neelen: "Yes, that covers it."

By the Court: "Gentlemen of the jury: Mere knowledge that an offense is to be committed or mere mental approval is not sufficient."

Exception was taken after verdict to the whole of the foregoing instructions on the subject of accessory.

For the plaintiff in error there was a brief by *N. B. Neelen* and *E. T. Fairchild,* and a reply brief and oral argument by *Mr. Fairchild.*

For the defendant in error the cause was submitted on a brief by the *Attorney General* and *Winfred C. Zabel,* district attorney, and a supplemental brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general.

The following opinion was filed March 14, 1916:

WINSLOW, C. J. The contention that the verdict is not sustained by the evidence must be overruled. While the proof of guilt was entirely circumstantial it was none the less persuasive and we see no reason to suppose that there has been any miscarriage of justice. The introduction in evidence of the Turkish money and the pistol found in the defendant's possession was entirely proper. Their probative value was a question for the jury to consider. The serious question in the case arises upon the supplemental charge to the jury. Evidently some of the jury at least were considering the question whether the defendant might not be convicted if he had been an accessory and hence came the application to the court for instruction on the subject. If, under an informa-

tion charging murder alone, a person may be found guilty simply on proof that he was an accessory, these instructions were properly given, otherwise not. This raises a question which is not without difficulty. At common law the principal and accessory were guilty of separate and distinct crimes, and no person could be convicted of one on evidence showing him to be guilty of the other. 1 Wharton, Crim. Law (11th ed.) §§ 239, 278; *State v. Buzzell,* 58 N. H. 257; *Pettes v. Comm.* 126 Mass. 242; *State v. Wyckoff,* 31 N. J. Law, 65; *Walrath v. State,* 8 Neb. 80.

While the accessory was guilty of a distinct crime it was nevertheless a dependent crime, *i. e.* the conviction of the person guilty of the principal crime must precede or accompany the conviction of the accessory. 1 Wharton, Crim. Law (11th ed.) § 277. This requirement necessarily produced more or less frequent failures in the administration of justice. If the man who actually performed the murder escaped, the accessory could not be convicted; hence the enactment of statutes to remedy the difficulty. In a general way it may be said that there are two classes of these statutes. The most numerous class abolishes in terms all distinction between the two crimes and declares that an accessory may be convicted and punished as a principal. Wharton, Homicide (3d ed.) § 66. Under such a statute the instructions given here would of course be entirely correct. The other class of statutes is modeled after the English statute referred to in *Ogden v. State,* 12 Wis. 532. Wisconsin is in the latter class. The sections covering the subject now appear as secs. 4613, 4614, and 4615, Stats. 1915, and they have been upon the statute book without material change since 1839 (Terr. Stats. 1839, pp. 381, 382).

It is correctly said in the *Ogden Case* that our statute is borrowed from the English statute and the gist of it as it then existed is stated thus:

"It enacts that every person who shall counsel, hire, or otherwise procure, any offense to be committed, which shall

be a felony, may be indicted and convicted as an accessory before the fact, either with the principal felon, or after the conviction of the principal felon, or he may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been convicted, or shall or shall not be amenable to justice, and in the last mentioned case may be punished in the same manner as if convicted of being an accessory before the fact." [R. S. 1858, ch. 172, sec. 2; Stats. 1915, sec. 4614.]

The slight changes made since that decision do not in any way affect the question raised here.

It is argued that the words "substantive felony" in this statute mean the principal felony, and hence that an accessory may and should be indicted as a principal. We are well convinced that this contention cannot be sustained. Had the legislature meant that the accessory was to be held to be a principal and prosecuted as such, it would have been very easy to say so in half the words. It is clear to our minds that the intention of the statute was to make the punishment the same as the principal's and to abolish the old rule that the principal must first be convicted in order to make possible the conviction of an accessory; and that the words "substantive felony" simply mean a felony not dependent on the conviction of another person for another crime. Such was certainly the construction given to the statute in the *Ogden Case,* where it is said in the opinion that Ogden was indicted "as for a substantive felony, being charged as an accessory before the fact to the crime of arson." Evidently no suspicion lurked in the mind of Chief Justice DIXON when he wrote that opinion that the words "substantive felony" meant the principal crime. See, also, *Tarasinski v. State,* 146 Wis. 508, 131 N. W. 889. Similar statutes in other states have received the construction given to our statute in the *Ogden Case. State v. Ricker,* 29 Me. 84; *Pettes v. Comm.* 126 Mass. 242; *Williams v. State,* 41 Ark. 173.

The result is that under our statute an accessory before the fact is still to be prosecuted as such, but it is not essential to

his conviction that the perpetrator of the principal crime be prosecuted or convicted; it being sufficient to prove the guilt of the principal felon. The instructions excepted to were therefore erroneous and misleading. But we are met here with the question whether this is an error of which the defendant can now take advantage. The defendant's counsel was present when the supplemental charge was given. It appears by the record that, after the trial judge had defined the word "accessory" and read the section of the statute relating to the punishment, defendant's counsel requested the court, "in addition to the definition of accessory, to state to the jury that before you can find the defendant guilty of being an accessory you must be convinced beyond a reasonable doubt that the defendant commanded, counseled, or procured the commission of the felony by another," and that the court gave the instruction so requested.

No objection was suggested at the time to the giving of the general instructions as to an accessory, but the court was asked to add the proviso just stated. This proviso means, "you can find the defendant guilty if you find beyond a reasonable doubt that he commanded, counseled, or procured the murder," or it means nothing. It really covers the whole charge on the subject of accessory, and the question is whether any objection to that charge was not thereby waived.

There can be no doubt that in a civil case error cannot be assigned upon an instruction given at the appellant's own request. While the courts have been somewhat slow in applying the doctrines of estoppel and waiver to criminal actions, there is no question now as to their applicability even in capital cases. *Emery v. State,* 101 Wis. 627, 78 N. W. 145; *Hack v. State,* 141 Wis. 346, 124 N. W. 492; *Oborn v. State,* 143 Wis. 249, 126 N. W. 737.

A defendant in a criminal case cannot allege error in the admission of unsworn testimony if he consented to the omission of the oath (*Robinson v. State,* 143 Wis. 205, 207, 126 N. W. 750); nor can he claim error in the exclusion of evi-

dence if the ruling was made on his own objection (*Bowers v. State,* 122 Wis. 163, 99 N. W. 447). It is to be noted that the last-named case was a capital case. Logically he ought not to be allowed to claim error in the giving of an instruction which he requested. If this were a case where it seemed that there was grave doubt as to the defendant's guilt, we might perhaps reverse the judgment notwithstanding the fact that the instruction was in substance requested. It is not such a case, however, and hence we feel compelled to affirm.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, without costs, on May 23, 1916.

NELSON and others, Respondents, vs. FAIRCHILD & NORTH-EASTERN RAILWAY COMPANY, imp., Appellant.

February 5—May 23, 1916.

Appeal: Affirmance on equal division: Contracts: Railway construction: Conclusiveness of engineer's estimate.

Upon an appeal from a judgment for the amount found due on a railway construction contract, the justices participating in the decision being equally divided as to the conclusiveness of the final estimate of defendant's chief engineer and upon the question of affirmance of the whole judgment, the judgment is affirmed.

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES WICKHAM, Circuit Judge. *Affirmed.*

This action was brought to recover under a railway construction contract for completing a certain part of a railroad. The dispute is as to the balance due the plaintiff and to enforce a lien against the property. The court found substantially as follows:

(1) That on the 15th day of March, 1912, a contract for construction was made between plaintiffs and defendant railway company.

(2) On March 22, 1912, the plaintiffs made a contract with the defendant Jacobson, by the terms of which Jacobson was to do a part of the work as subcontractor.

(3) That pursuant to the contract between plaintiffs and the defendant railway company plaintiffs and certain subcontractors, including the defendant Jacobson, entered upon the performance of the work in April, 1912, and thereafter performed all the conditions of the contract in manner provided therein to the satisfaction of the president of said railway company and its chief engineer, which work was completed on or about November 17, 1912, except the portion thereof performed by said Jacobson, which was completed on or about February 18, 1913, but no damages are claimed by the defendant railway company for failure of plaintiffs and their subcontractors to complete the work within the time required by the contract.

(4) That in the performance of said work under said contract with said railway company, plaintiffs and their subcontractors performed the work and earned, at the prices specified in the contract, the respective amounts hereinafter stated:

Clearing 38.49 acres, at $25 per acre	$962 25
Grubbing 648.68 sq. rds., at $1 per sq. rd	648 68
Piling, 10,861 lineal ft. at 20c. per lin. ft	2,172 20
Timber work, 183,415 feet at $11 per M. feet	2,017 56
Hauling and placing culvert pipes, 4,624 lineal feet at 43c. per ft	1,988 32
Excavating earth, 333,303 cu. yds. at 20c. per cu. yd	66,660 60
Excavating loose rock, 9,575 cu. yds. at 35c. per cu. yd	3,351 25
Excavating sand rock, 62,837 cu. yds. at 40c. per cu. yd	25,134 80
Overhaul, 749,801 cu. yds. at 1¼c. per cu. yd	9,372 51
Extra work of plaintiffs as per finding No. 5	118 67
Extra work of Jacobson as per finding No. 6	91 00
Making a total amount earned for the work above specified	$112,517 84

(5) That in the performance of said work plaintiffs performed extra work in pursuance of an order of the chief engineer of defendant railway company in changing the line of said road at station 771 to 773 and expended in the performance of said work $178.67, which is a reasonable price

therefor, no part of which has been paid except $60, leaving a balance due plaintiffs for said work of $118.67.

(6) That in July and August, 1912, the defendant Jacobson performed extra work for said railway company in repairing and improving its right of way pursuant to an order of the chief engineer of said railway company, to the amount and reasonable value of $91, no part of which has been paid; that said order for the performance of said work was not by any express words affirmed by the president of said railway company, but said railway company, under circumstances making it chargeable with notice of the facts, received the benefit of the work, made no objection thereto, and waived the provisions in the contract requiring the order therefor to be affirmed by its president.

(7) That between stations 365 and 395 said defendant Jacobson hauled material from excavations a longer distance than 2,600 feet, the limit of overhaul provided for in said contract, the amount of which material so hauled beyond said limit, if computed according to said contract, had no limit of haul been therein prescribed, would have amounted to 27,495 cubic yards of overhaul; that said work was performed at the request of the chief engineer of said railway company and on his promise that said railway company would pay therefor; that said order of said chief engineer was not affirmed by the president of said railway company and the provision of the contract on that subject was not waived; that said 27,495 cubic yards is not included in the overhaul included in finding No. 4, but that credit is there given for hauling all of said material to the limit of the overhaul.

(8) That the plaintiffs in excavating rock in the cut at stations 401 to 417 removed 2,181 cubic yards of rock of the character indicated by exhibits 6*a* and 6*b* which are in evidence, and the defendant Jacobson, at a cut located at station 481 to 490, removed from an excavation a quantity of rock amounting to 4,148 cubic yards of the character indicated by exhibits 11*c* and 11*d*; that said respective parties claim that said rock is hard rock within the terms of the contract, and offered evidence tending to show that it is customary for engineers engaged in classifying such rock to classify it as hard rock, but the court finds that all such rock in fact is hard rock and none of it harder than sand rock, and that such parties

did not in the performance of their work remove any hard rock as that term is defined by the contract.

(9) That prior to the commencement of this action the defendant railway company paid to plaintiffs on account of the work performed under such contract $97,624.38.

(10) That the portion of the work included in the foregoing findings which was performed by the defendant Jacobson at the prices he was entitled to, and the amount earned by him, are as follows:

Clearing 5.2 acres, at $17.50 per acre	$91 00
Grubbing 38.32 acres, at 75c. per acre	28 74
Hauling and laying culvert pipe, 1,856 lineal feet at 40c. per foot	742 40
Excavating earth, 1,407,797 cu. yds. at 17½c. per cu. yd	24,638 47
Excavating loose rock, 9,385 cu. yds. at 30c. per cu. yd	2,815 50
Excavating sand rock, 28,560 cu. yds. at 35c. per cu. yd	9,996 00
Overhaul from station 335 to 405, 301,710 cu. yds. at ¾c. per cu. yd	2,262 82
Overhaul from station 890 to 1070, 135,057 cu. yds. at 1c. per cu. yd	1,350 57
Extra work as per finding No. 6	91 00
Making a total amount earned by said Jacobson, the sum of	$42,016 50

(11) That prior to the commencement of this action plaintiffs paid to defendant Jacobson on account of work performed under said subcontract the sum of $39,245.95.

(12) That J. H. Thomas, from the time work was commenced under plaintiffs' contract until about September 15, 1912, was chief engineer of defendant railway company and acted as such in the performance of the work under said contract, and that about the date last named T. B. Knuth was appointed in his place and continued to act as such chief engineer until said work was completed.

(13) That on February 22, 1913, said chief engineer made a final estimate of the work done under said contract and certified to its being correct, and delivered the same to the plaintiffs, and thereafter and on the 28th of March, 1913, said chief engineer made and delivered to plaintiffs a revised final estimate of such work done under said contract in which certain slight additions and changes were made to the estimate previously made and delivered, which estimates as revised showed the following amount of labor performed by plaintiffs and their subcontractors under such contract:

Clearing 38.49 acres; grubbing 648.68 sq. rds.; earth excavations, 357,383 cu. yds.; overhaul, 733,641 cu. yds., loose rock, 10 cu. yds.; sand rock, 48,322 cu. yds.; piling driven, 10,861 lineal feet; timber in bridges and cattle passes, 183,415 sq. ft.; pipe, culvert, 4,624 lineal feet; which various items were computed in said revised final estimate as $107,768.42, and after deducting $97,624.38 leaves a balance of $10,144.04 as the amount due; that said estimate also showed, which is included in the figures hereinbefore stated, the following amount of labor performed by the defendant Jacobson: Clearing, 5.2 acres; grubbing, 38.32 sq. rds.; earth excavation, 150,283 cu. yds.; overhaul, 420,607 cu. yds.; sand rock, 28,459 cu. yds.; pipe, culverts, 1,856 lineal feet.

(14) That in making said final estimate and the computation upon which the same was based said chief engineer failed to make the same in accordance with the terms or on the basis contemplated by the contract between plaintiffs and the defendant railway company in the following particulars:

(a) A large portion of his classification of material removed from excavation was based on information derived from the appearance of the excavation after the removal of the material, without observation or measurement of material as the work progressed, and part thereof on inaccurate hearsay information as to where blasting was done, and not in compliance with the provision of the contract, which provides that "All cuttings shall be measured in the excavation and estimated by the cubic yard under the following heads, viz. earth, loose rock, sand rock, and hard rock."

(b) That he made his computation and estimate on the erroneous assumption that a certain clause in the contract designated certain loose rock therein referred to as rock "containing not less than one cubic yard" instead of the words "containing not over one cubic yard" which were used in the contract.

(c) That in making said estimate he proceeded on the erroneous assumption that stone and rock of all kinds, whether intermixed with earth or not, which could be removed from the excavation by a steam shovel without blasting, should be classified as earth, and because of such mistake he classified most of the loose rock in the excavation as earth.

(d) That he failed to allow items of overhaul on grounds which his testimony and final estimate show to be incorrect.

(15) That plaintiffs and the defendant Jacobson each filed in the office of the clerk of the circuit court of Eau Claire county a claim for lien as alleged in their respective pleadings.

(16) That on May 18, 1914, when this action was reached for trial, plaintiffs moved for continuance, and as a condition of said continuance being allowed it was stipulated that the plaintiffs should waive interest on the amount for which the defendant railway company tendered judgment, from May 18, 1914, until the date of trial in the regular order on the calendar of the court at the September, 1914, term; that on October 12, 1914, the court prepared to take up the trial of the case in its order, but by agreement of counsel the case was set for trial November 9, 1914.

(17) That the amount now due from the defendant railway company is the sum of $14,893.46, with interest from March 15, 1913, at six per cent., excepting that interest shall not be computed from May 18, 1914, to October 12, 1914, on the sum of $10,144.04, for which judgment was tendered.

(18) That the amount due to the defendant Jacobson is $2,771.55, with interest from April 23, 1913, at six per cent.

The court concluded: (1) That by the terms of the contract entered into between plaintiffs and defendant railway company it was not contemplated by the parties that the final estimate of the chief engineer should be binding and conclusive upon the parties as to measurement or classification of work or computation of amounts due the plaintiffs therefor, or on any subject other than that of giving said final estimate, if in his judgment the work was performed in the manner provided by the contract and to his satisfaction; and of withholding the same if the work was not so performed. (2) That even if said contract should be construed the same as if it contained a provision that the final estimate of the chief engineer should be final and conclusive between the parties as to measurements, classification, and computation of

amounts due, the result would not be materially different, because the facts found in finding No. 14 amounted to such a departure on the part of said chief engineer from the terms of the contract, and such a failure to exercise his judgment on the matters involved therein, that his final estimate is not binding upon the parties. (3) That the plaintiffs and the defendant Jacobson are entitled to judgment of foreclosure according to the demand of plaintiffs' amended complaint for the amount of their respective claims, with costs, the amount of the plaintiffs' claim being the amount found due from the defendant railway company by finding No. 17, less the amount of the claim of said Jacobson, and the amount of said Jacobson's claim being the amount found due him by finding No. 18.

Judgment was entered in favor of the plaintiffs in accordance with the findings of fact and conclusions of law, from which this appeal was taken.

For the appellant there was a brief by *Bundy & Wilcox,* and oral argument by *C. T. Bundy.*

For the respondents there was a brief by *Sturdevant & Farr,* attorneys, and *Clapp & Macartney,* of counsel, and oral argument by *L. M. Sturdevant.*

For the defendant Jacobson there was a brief by *Einar Hoidale.*

The following opinion was filed March 14, 1916:

KERWIN, J. The four justices participating in the decision are equally divided on the question of affirmance of the whole judgment. Chief Justice WINSLOW and Justice VINJE are of opinion that under the terms of the contract the final estimate of the chief engineer was final and conclusive in the absence of fraud or a mistake in some fundamental fact or right in the light of which his decision should have been but was not exercised. They are also of opinion that there was such a mistake here in assuming that the contract contained the words "not less than one cubic yard" instead of

the words "not over one cubic yard," and that this erroneous assumption formed one of the fundamental bases on which his estimate of loose rock was made, hence that the estimate as to loose rock was not conclusive but open to correction, and that the findings of the trial court on that subject are correct. They therefore think that the judgment should be affirmed as to all items except the amount found due for overhaul, as to which they think there should be reversal. Justice SIEBECKER and the writer are of opinion that the estimate of the engineer was not final and conclusive under the terms of the contract but open to correction, and that mistakes were made by the engineer in estimating the amount due as found by the trial court, therefore that the judgment should be affirmed. In this situation the judgment must be affirmed.

By the Court.—The judgment is affirmed.

A motion for a rehearing was denied, with $25 costs, on May 23, 1916.

STATE EX REL. BUNDY, Respondent, vs. NYGAARD, County Clerk, Appellant.

February 5—May 23, 1916.

Taxation of incomes: Profits on sale of stock: Capital or "income"? When status is fixed.

1. Income, as the term is used in sec. 1, art. VIII, Const., is the profit or gain derived from capital or labor or from both combined, and it must be money or something equivalent thereto.
2. Where corporate stock purchased as an investment in 1907 for $110,000 was on January 1, 1911, of the value of $214,000, and was sold in 1914 for $214,000, no part of the last-named amount was taxable as income. The status, as capital, of the entire value of the stock being fixed when the Income Tax Law was first passed, no part thereof could be made into income by legislative enactment.

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES WICKHAM, Circuit Judge. *Affirmed.*

The relator sued out a writ of *certiorari* to review the proceedings of the income tax board of review of Eau Claire county and the state tax commission with respect to an income tax assessed against the relator for the year 1914. The facts were undisputed. On September 1, 1907, the relator purchased 1,000 shares of the common stock of the Chippewa Valley Railway, Light & Power Company and 100 shares of its preferred stock as an investment at par, and on February 20, 1914, sold the common stock at $200 per share and the preferred stock at $140 per share, or an advance in all of $104,000. The taxing officials, following the directions of par. (d), sub. 2, sec. 1087*m*—2, Stats. 1913, assessed as income subject to taxation in 1914 the proportionate amount of this profit of $104,000 which the period of time between January 1, 1911, and the date of sale bears to the entire time between the date of acquisition (September 1, 1907) and the date of sale, which amount they fixed at $50,413.23. There was substantially no difference between the value of the stock January 1, 1911, and at the date of its sale. The circuit court held the assessment void, and the defendant appeals.

For the appellant there was a brief by *Fred Arnold,* district attorney for Eau Claire county, and the *Attorney General* and *E. E. Brossard,* assistant attorney general, of counsel; and the cause was argued orally by *Mr. Arnold* and *Mr. Brossard.*

For the respondent there was a brief by *Bundy & Wilcox,* and oral argument by *C. T. Bundy in pro. per.* and *Roy P. Wilcox.*

WINSLOW, C. J. (*on motion for rehearing*). When this case was originally argued and submitted in February last, six justices participated in the hearing and there was an equal division among them as to the proper judgment. The

judgment of the trial court was therefore affirmed without opinion, as is usual in such cases. A motion for rehearing was seasonably filed, and while the motion was pending another action involving precisely the same question came on to be heard in its regular order on the calendar (*State ex rel. O. H. Ingram Co. v. Wis. Tax Comm., post,* p. 311, 158 N. W. 89). At this time two changes had taken place in the personnel of the sitting bench, and it was considered that the last-named case and the motion for rehearing ought to be considered together, in order that a conclusion on the merits might, if possible, be reached, applicable to both cases.

The arguments have now been heard and the court is of opinion that both cases were correctly decided in the trial courts.

The Income Tax Law (sec. 1087*m*—1, Stats. 1913) provides for the levying of a tax on "incomes received during the year ending December 31, 1911, and upon incomes received annually thereafter," and in sub. 2 of sec. 1087*m*—2 defines the term "income." Par. (d) of the last-named subsection provides that the term "income" shall include "all profits derived from the transaction of business or from the sale of real estate or other capital assets; provided, that of the profits derived from the sale of real estate or other capital assets acquired previous to January 1, 1911, only such proportion shall be taxable as the time between January 1, 1911, and the date of sale bears to the entire time between the date of acquisition and the date of sale."

In the present case it appears without dispute that the relator on January 1, 1911, owned stock which he had purchased as an investment more than four years previously which was of the value of $214,000, and that on February 20, 1914, he sold the same for $214,000. Upon these facts the court now reaches the conclusion that there is in fact no income in the present case within the meaning of that word as used in the constitution.

The constitution (sec. 1, art. VIII) permits the taxation of "incomes," and the statute (secs. 1087*m*—1 to 1087*m*—29, Stats. 1913) provides for the levying of a tax upon "incomes" received during the year.

The word "income" has a definite, well-understood meaning. No attempt was made to define it in the constitutional amendment for the reason that it carried its meaning with it. That meaning was and is the "common, ordinary meaning," as the word is used in every-day life. *Van Dyke v. Milwaukee,* 159 Wis. 460, 150 N. W. 509. In brief, it may be said to be the profit or gain derived from capital or labor or from both combined. *Stratton's Independence v. Howbert,* 231 U. S. 399, 34 Sup. Ct. 136; *Income Tax Cases,* 148 Wis. 456, 513, 134 N. W. 673, 135 N. W. 164. It must be gain or profit and it must be money or something equivalent thereto. *Income Tax Cases, supra.*

"The Income Tax Law does not seek to reach property or an interest in property as such, but to reach incomes having a situs within the state or growing out of a privilege exercised or occupation conducted within the state." *State ex rel. Manitowoc G. Co. v. Wis. Tax Comm.* 161 Wis. 111, 152 N. W. 848.

"Income in the sense of tax laws is not the capital or stocks of goods in which the capital may be expended." *U. S. Glue Co. v. Oak Creek,* 161 Wis. 211, 153 N. W. 241.

When the Income Tax Law was first passed in 1911 the stock in question was held by the plaintiff and was then of the value of $214,000. This fact is admitted to be established. In the judgment of the court all of this was capital, or, in other words, property; its status was fixed; no part of it could be made into income by legislative enactment. It was subject to taxation as property under the uniformity rule but not otherwise. It is not deemed necessary to go further in the present case, although other questions were raised and elaborately discussed, among them being the question whether, if property were bought as an investment after the

passage of the law and afterwards sold at an advance, the profit could be taxed as income, and, if so, whether interest on the original investment is to be allowed in determining profits and whether dividends received should be set off against the interest.

No opinion is expressed or intimated upon these questions nor upon the other questions raised in the *Ingram Case.*

By the Court.—Motion denied without costs.

STATE EX REL. O. H. INGRAM COMPANY, Respondent, vs. WISCONSIN TAX COMMISSION, Appellant.

May 4—May 23, 1916.

State ex rel. Bundy v. Nygaard, ante, p. 307, followed.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

For the appellant there were briefs by the *Attorney General* and *E. E. Brossard,* assistant attorney general, and oral argument by *Mr. Brossard.*

For the respondent there was a brief by *Bundy & Wilcox,* and oral argument by *C. T. Bundy.*

WINSLOW, C. J. This is an appeal from a judgment of the circuit court for Dane county in an action of *certiorari* setting aside an income tax assessment made by the *Wisconsin Tax Commission* against the respondent. The fundamental question involved is the same as the question considered and decided in the case of *State ex rel. Bundy v. Nygaard, ante,* p. 307, 158 N. W. 87. The judgment is therefore affirmed for the reasons stated in the opinion filed on the motion for rehearing in that case.

By the Court.—Judgment affirmed without costs.

BUCHHOLZ, Respondent, vs. ROSENBERG, imp., Appellant.

February 24—May 23, 1916.

Building contracts: Substantial performance: Allowances to owner for defects: Interest on balance due: Garnishment: Costs.

1. **Where a building contract has been substantially, though not exactly, performed, the deduction to be made from the contract price on account of any defect is the reasonable cost of remedying the defect if this can be done without reconstructing a substantial part of the building; otherwise, the diminished value of the building, on the basis of the contract price, by reason of the defect.**
2. **Thus, where a composition roof had been put upon a building, and it appeared that to replace it with a gravel roof as called for in the contract would not involve any reconstruction of the building or great sacrifice of inwrought material, the owner should be allowed the cost of making such change; but where a concrete basement floor, though not according to contract, was serviceable and fit for the purposes intended, and to put in such a floor as the contract required would necessitate reconstruction of a substantial portion of the building and the sacrificing of much work and material already wrought into it, the allowance to be made for such defect should be the diminished value of the building—in this case the difference between the value of the floor which was put in and the cost of such a floor as the contract called for.**
3. **In such a case, in an action by a subcontractor against the principal contractor, wherein the owner was garnishee, interest upon the amount found due to the principal contractor from the date when it became due was properly allowed against the garnishee.**
4. **In a garnishment action, upon the trial of an issue between the plaintiff and the garnishee, the plaintiff is entitled, under sec. 2772, Stats. 1913, to costs against the garnishee if he recovers more than the garnishee admits in his answer.**

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Modified and affirmed.*

Garnishment. The main defendant, Riemenschneider, in June, 1910, contracted with the garnishee defendant, *Rosenberg,* to erect and furnish materials for a two-story factory

building with basement for $5,450, the work to be done to the satisfaction and under the direction of *Rosenberg*. Riemenschneider proceeded to erect the building, and plaintiff became his subcontractor. Not being paid in full, the plaintiff sued Riemenschneider for the balance due him and garnished *Rosenberg*. Judgment for the plaintiff was recovered in the main action for the sum of $557.78. In the garnishee action *Rosenberg* appeared and denied liability and the action was tried by the court, *Rosenberg* claiming that the building never was completed according to the terms of the contract, and that by reason of defects in construction of the building he had been damaged in nearly or quite as large a sum as remained unpaid to Riemenschneider on the contract. The trial judge viewed the premises and thereafter made findings to the effect (1) that the building was built by Riemenschneider under *Rosenberg's* direction and fully completed on December 20, 1910; (2) that *Rosenberg* inspected the work from day to day and on said last named date took possession of the building and has ever since used and occupied the same; (3) that the same was constructed as agreed in a good and workmanlike manner except that a composition instead of a gravel roof was put on, and that the concrete floor in the basement was not of uniform strength; (4) that the roof is a serviceable roof and was accepted, has been used four years, that replacing the same by a gravel roof as contracted for would cost $120, and that $80 deduction from the contract price should be allowed on account of the roof; that the concrete floor is a strong, serviceable floor and that $60 deduction from the contract price should be allowed for the floor, making a total of $140 to be deducted from the contract price; (5) that defendant performed extra work and furnished extra material amounting to $130; (6) that payments amounting to $4,881 had been made on the contract, leaving a balance due thereon on January 20, 1911, of $559, which with interest at six per cent. from that date amounted to $643.32 owing by *Rosenberg* to Riemenschneider at the

time of the commencement of the garnishment action, July 25, 1913; (7) that plaintiff recovered judgment in the main action for $557.78 February 6, 1915, which is still unsatisfied. Upon these findings it was adjudged February 23, 1915, that *Rosenberg* was liable as garnishee in said sum of $643.32 with interest from February 6, 1915, also that the plaintiff, *Buchholz,* recover of the garnishee, *Rosenberg,* the sum of $557.78 with costs, and from this judgment the garnishee appeals.

Michael Levin, attorney, and *A. W. Richter,* of counsel, for the appellant.

James F. Trottman, for the respondent.

The following opinion was filed March 14, 1916:

WINSLOW, C. J. The court found in effect that the contract was substantially performed notwithstanding the fact that the roof and basement floor did not correspond to the specific calls of the contract. While it is stated in appellant's brief that this finding is not justified, he assigns no error on this ground and states that he does not press the point, hence the question is not an open one in the case.

We start, therefore, with the established fact that the contract was substantially though not exactly performed, and this means that both the roof and the floor were serviceable and fit for the purposes intended. This must be so, for otherwise there could not be substantial performance. Starting from this premise, the fundamental inquiry is whether the court made the proper deductions from the contract price on account of these failures in exact performance. There is no doubt as to the proper rule in this court. It may be stated as follows: If the defect can be remedied without reconstructing a substantial part of the building or, as otherwise expressed, without great sacrifice of work and material already wrought into the building, the reasonable cost of correcting the defect should be allowed; if otherwise, the di-

minished value of the building, on the basis of the contract price, by reason of the defect. *Sherry v. Madler,* 123 Wis. 621, 101 N. W. 1095; *Manning v. School Dist.* 124 Wis. 84, 102 N. W. 356. The roof actually put on was a felt or asphalt paper roof. To take this off and put on a tar and gravel roof would not involve any reconstruction of the building or great sacrifice of inwrought material, hence the court, instead of allowing $80, should have allowed on this item the expense of a new gravel roof, which was shown to be $120.

It is apparent that to equip the building with a floor such as the contract requires would necessitate the reconstruction of a substantial portion of the building and the sacrificing of much work and material already wrought into it, hence the second branch of the rule applies to the floor and the allowance must be the diminished value. The court placed the allowance to be made for the defective floor at $60, but there is no testimony on which that finding can be based. It appeared without dispute that the floor cost $290 and there was testimony that it was worth that sum. One witness testified that a new floor constructed according to the specifications of the contract would cost $467.27, while the defendant Riemenschneider estimated the cost at $385.

This testimony would afford basis for a finding that the diminution in value was the difference between the value of the old floor and the cost of the new, but not for a finding of any less sum. This would mean that the court should have allowed not less than $95 nor more than $177.27 on account of the floor. The court in fact allowed $60. The appellant would have had no ground of complaint as to this item had $177.27 been allowed instead of $60. We deem it better for both parties to modify the judgment and make the proper allowance now and thus close the litigation, rather than prolong it by sending the case back for a new trial or to take further testimony.

Two further contentions are made: first, that costs should

not have been allowed against the garnishee, and second, that interest should not have been allowed on the claim of Riemenschneider against *Rosenberg*. Neither contention can be sustained. The statute gives costs if the plaintiff recovers more than the garnishee admits in his answer. Sec. 2772, Stats. 1913. As to interest, the case of *Laycock v. Parker*, 103 Wis. 161, 79 N. W. 327, is controlling.

The judgment must be modified as of its date so as to adjudge that *Rosenberg* was indebted to Riemenschneider at the date of the commencement of the garnishment action July 25, 1913, in the sum of $401.73 (plus interest at six per cent. from January 20, 1911), amounting in all to $462.32; that the plaintiff recover that sum from the garnishee with interest from February 6 to February 25, 1915, amounting in all to $463.62; and that he recover his costs as taxed, amounting to $44.40, making a total recovery as of February 23, 1915, of $508.02; and as so modified the judgment must be affirmed.

By the Court.—Judgment modified as indicated in the opinion, and as so modified affirmed, without costs, except the fees of the clerk of this court to be paid by the respondent.

A motion for a rehearing was denied, with $25 costs, on May 23, 1916.

PFEIFFER, Administrator, Respondent, vs. CHICAGO & MILWAUKEE ELECTRIC RAILROAD COMPANY and others, Appellants.

February 25—May 23, 1916.

Evidence: Testimony of deceased or absent witness: Statute construed: Instructions to jury: Witnesses: Impeachment.

1. The "retrial, other action, or proceeding" in which, under sec. 4141*a*, Stats., the testimony of a deceased witness or a witness who is absent from the state is, under certain conditions, admissible, is a retrial of the same action in which such testimony was originally taken, or other action or proceeding involving the same issues and between the same parties.
2. Thus, where two persons were injured in a collision with an interurban car, the testimony of one of them, taken in his action against the corporation alleged to be responsible, is not admissible, by reason of his absence from the state, in an action to recover for the injury and death of the other person.
3. A question in a special verdict being as to whether the headlight of an interurban car, in a collision with which plaintiff's intestate was injured, was burning as the car approached the place of the accident, it was error, in instructing the jury, to say that the question was whether the headlight was such as to give efficient light and not a dim and flickering light almost out,—it appearing that it was an electric light and there being no evidence tending to show that it was or could have been burning dimly or flickering.
4. In an action to recover for the death of a person it was error to permit plaintiff to prove that a witness for defendant had on a certain occasion made a remark indicating personal animosity against the deceased and his family, such testimony being admissible only for purposes of impeachment and after the proper foundation for it had been laid.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Reversed.*

For the appellants there was a brief by *Edgar L. Wood,* attorney, and *Bull & Johnson,* of counsel, and oral argument by *Mr. Wood.*

For the respondent there was a brief by *N. W. Evans & W. J. Riley,* and oral argument by *Mr. Riley.*

The following opinion was filed March 14, 1916:

PER CURIAM. The respondent recovered judgment against the appellants for $6,000 damages resulting from negligent injuries inflicted upon one George Pfeiffer, causing suffering and death. The accident occurred at 7:20 o'clock on the evening of February 4, 1912, at a grade crossing in the town of Oak Creek, Milwaukee county, where the Rawson road is crossed by the interurban railway track of appellants. The plaintiff's intestate and one Wolosek, after spending the day at a liquor saloon within a few rods of this crossing, were riding in a bob-sled drawn by one horse eastwardly on the Rawson road after dark towards their home with their ears covered, and while on the crossing were struck by a north-bound interurban car. This is the same accident which was involved in the case of *Wolosek v. Chicago & M. E. R. Co.* 158 Wis. 475, 149 N. W. 201, and reference may be made to that case for a more extended statement of the facts.

A very strong showing was made by defendant by the testimony of disinterested witnesses as well as by that of its conductor and motorman to the effect that the interurban car was provided with a sufficient headlight and gave the usual signals for that crossing. The plaintiff's case rested upon the testimony of said Wolosek given by him in the action just referred to, which was brought by him to recover damages for his own injuries occasioned by the same collision. This testimony was received in evidence against the objection and exception of the appellants, and without it there is no evidence to support the verdict.

To a lawyer trained in the common law the claim that such testimony is admissible is novel and almost startling. The witness is not sworn in this case, therefore not punishable for perjury therein. To pick out the testimony of a witness given in a former cause perhaps years before, wherein the parties were different although the act under investigation

the same, and read it to the jury in the new action with the same force and effect as if the witness was sworn and testified in such new action, is not, we think, warranted by the statute relied on for its admission. That statute is sec. 4141*a*, Stats., and reads as follows:

"The testimony of any deceased witness, or any witness who is absent from the state, taken in any action or proceeding, except in a default action or proceeding where service of process was obtained by publication, shall be admissible in evidence in any retrial, other action, or proceeding where the party against whom it is offered shall have had an opportunity to cross-examine the said deceased or absent witness, and where the issue upon which it is offered is substantially the same."

This section as first enacted (ch. 107, Laws 1909) applied only to the testimony of deceased witnesses, but was amended by ch. 65 of the Laws of 1911 to include witnesses "absent from the state."

It is contended that the words "other action or proceeding where the party against whom it is offered shall have had an opportunity to cross-examine the said . . . witness, and where the issue upon which it is offered is substantially the same," includes actions or proceedings by any other person against the same defendant wherein the issues are substantially the same as those in the case in which the testimony was given. There is no time limit within which such testimony may be used; the first action may have been comparatively unimportant as to the amount involved, the second very important (as is the case here); the party against whom the testimony is offered may have won the former case on the testimony of a witness now deceased whose testimony cannot be used in the second case because the opposing party was not a party to the former suit and hence had no opportunity for cross-examination. We should scrutinize carefully the statute before giving it any such construction. The common-law rule was to the effect that if a witness whose testimony

had been taken at a former trial of the same action between the same parties or their privies is dead or insane or beyond the seas, his testimony may be read upon a subsequent trial of the same action. Jones, Ev. (2d ed.) §§ 340, 341; 16 Cyc. 1088 *et seq.; London G. & A. Co. v. American C. Co.* 251 Ill. 123, 95 N. E. 1064. The statute relied on makes the testimony admissible in evidence "in any retrial, other action, or proceeding" described. We think this must be limited to retrial of the same action or "other action or proceeding" involving the same issues and between the same parties. There is nothing in the words of the statute to extend it beyond this. It certainly relates to and includes retrials of the same cause between the same parties. "Other action or proceeding" extends the scope of the statute beyond a retrial of the same cause, but extends it no further. We find nothing in the statute extending its operation to actions or proceedings between other parties than those in which the original and sworn testimony was first given. On the other hand, we find the restriction to actions or proceedings between the same parties in the common law which preceded the statute, in the group of words "any retrial, other action, or proceeding," and in the rule of law which forbids us to extend by any latitudinarian construction the words of this statute to causes not expressly or by necessary implication included therein. It would have been very easy for the legislature to use language which would be clear and unmistakable if they intended to make so radical a change in the rules of evidence as is claimed by the respondent to have been made by this section. No such language was used, and we decline to extend the effect of the language used by any doubtful construction.

This conclusion necessitates reversal of the judgment. It seems proper to notice two other erroneous rulings, without, however, intimating that they would necessarily call for reversal of the judgment if they stood alone.

Among the questions submitted to the jury was one inquiring whether the headlight of the car was burning as it approached the crossing. In instructing the jury on this question the trial judge said in substance that the question was whether the headlight was such as to give efficient light and not a dim and flickering light, almost out. This was misleading. The headlight was an electric light. Either it was burning or it was not burning. There was no testimony tending to show that it was or could have been burning dimly or flickering.

The plaintiff was allowed against objection to prove that a witness called by the defendant had on a certain occasion made a remark indicating personal animosity against the deceased and his family. This testimony was admissible for purposes of impeachment only, and not then unless the foundation for it had been already laid by calling the attention of the witness sought to be impeached to the particular statement claimed to have been made and asking him whether he made it. *Ferguson v. Truax,* 136 Wis. 637, 118 N. W. 251.

We do not find it necessary to treat any other questions.

Judgment reversed, and action remanded for a new trial.

Upon a motion by the respondent for a rehearing, besides briefs on behalf of the respective parties there was a brief by *Moritz Wittig & H. J. Killilea,* of counsel for the Jones Islanders (interested especially in the case of *Illinois Steel Co. v. Muza,* not yet decided).

The motion was denied, with $25 costs, on May 23, 1916.

POLEBITZKE and another, Respondents, vs. JOHN WEEK LUMBER COMPANY, Appellant.

April 13—May 23, 1916.

Contracts: Construction: Conveyances: Waters: High-water mark.

1. Where an instrument is capable of different constructions, each of which does no violence to the language used, recourse may be had to the facts and circumstances surrounding the parties at the time of the execution thereof, for the purpose of determining its true construction, and the intention of the parties, if at all consonant with the language used, must govern its construction. The court, if possible, must give force and effect to every part of the instrument, reading nothing into it and nothing out of it.
2. Under the foregoing rule a conveyance, made in 1878 to a corporation engaged in logging, of land in lots 1 and 2 in a certain section, described as follows: "One rod wide along the meandered shore bordering on the Wisconsin river, including lake and bayous leading into the Wisconsin river, for the purpose of rafting and boomage," is construed to cover one rod in width from the ordinary high-water mark, rather than from the normal or usual stage of the river,—it appearing that there were no bayous on lots 1 and 2 in a normal stage of the water, and the construction adopted being in harmony with the purpose for which the land was bought, with the purchase price, with the language used, and with the practical construction given the conveyance by the parties.
3. By ordinary high-water mark is meant the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark by erosion, destruction of terrestrial vegetation, or other easily recognized characteristics.

APPEAL from a judgment of the circuit court for Portage county: GEO. W. BURNELL, Judge. *Reversed.*

Action to recover damages for trespass upon lots 1, 2, and 3 of section 15, township 24 north, of range 7 east. The jury awarded damages, $208, to about twenty-two acres, all of which, except one acre in lot 3, were in lots 1 and 2. In 1878 defendant's predecessors in title obtained a deed from George

Kickland, the then owner of lots 1 and 2, conveying land therein described as follows:

"One rod wide along the meandered shore bordering on the Wisconsin river, including lake and bayous leading into the Wisconsin river, for the purpose of rafting and boomage, with all the necessary rights and privileges thereunto pertaining; being on lots one (1) and two (2), section fifteen (15), township twenty-four (24), range seven (7) east."

This deed was recorded and the grantee therein and subsequent grantees from 1878 to 1905 took logs out in the summer that had floated into the bayous on lots 1 and 2 during the driving stage of the river. If there were freshets sufficient to enable them to roll the logs in the bayous and pole them out into the river they would do so; if not, they would use teams in getting them to the river. In April, 1906, plaintiffs purchased lots 1 and 2, and they claim they owned the land upon which the logs lay in 1906 to 1910 inclusive, and that they have been damaged by reason of the removal of the logs in those years by means of teams; that the lying of the logs on the land and the work of their removal rendered the land unfit for pasture or the cutting of hay. The defendant claims the logs lay and were removed on its own land and that it committed no trespass on lots 1 and 2. The case was here on a former appeal (157 Wis. 377, 147 N. W. 703), in which the nature of defendant's title to the lands conveyed was determined, and reference may be had to it for a fuller statement of facts.

The trial court instructed the jury that the land conveyed included "one rod outside the meandered shore on the Wisconsin river, and also one rod from the edge of any bayous or lakes described in said deed *at a normal stage* of the water in said river." Both parties agree that the phrase "meandered shore bordering on the Wisconsin river" means the natural shore of the river, but the defendant claims that the one rod in width on the bayous and on the river includes one rod be-

yond the ordinary driving stage of the river, and not one rod beyond the normal or usual stage of the river, and it appeals from the judgment entered upon the verdict.

For the appellant there was a brief by *Fisher & Cashin,* and oral argument by *William E. Fisher.*

A. L. Smongeski, for the respondents.

VINJE, J. Where an instrument is capable of different constructions, each of which does no violence to the language used, recourse may be had to the facts and circumstances surrounding the parties at the time of the execution thereof, for the purpose of determining its true construction, and the intention of the parties, if at all consonant with the language used, must govern its construction. The court, if possible, must give force and effect to every part of the instrument, reading nothing into it and nothing out of it. *Polebitzke v. John Week L. Co.* 157 Wis. 377, 147 N. W. 703, and cases cited.

It appears from the evidence that the lands in dispute constitute a low strip lying between a highway and the river, opposite and below a sharp bend therein, causing logs to float in upon the land during a driving stage of water, which is usually four or five feet higher than a normal stage; that there are no bayous on lots 1 and 2 during a normal stage of water, but during a driving stage of the river the water floods the greater portion of the strip and bayous are formed therein. Touching the upper end of the strip is a body of water that may be called a lake, and was no doubt the lake referred to in the deed. Since Kickland conveyed to the Menasha Wooden Ware Company in 1878, it and its subsequent grantees have entered upon the land during the summer and removed its logs by means of the bayous if the water was sufficiently high for so doing; if not, by means of teams, as was done in the years 1906 to 1910 inclusive. Mr. Kickland lived during all this time near and in sight of the land and

made no objection to such removal or claimed any damages therefor, tending to show that the original parties considered that the land in question passed under the deed. The area of land in dispute amounts to about twenty-one acres. If, as plaintiffs claim, only one rod from the normal stage of water was conveyed, then only a strip along the river one rod in width and containing from one to one and a quarter acres passed—a strip which the evidence shows has been of no particular value to defendant or its predecessors in title. The consideration expressed in the deed of 1878 was $100. It is not at all probable that experienced lumbermen would pay that amount of money for less than an acre and a half of land of no particular value to them. On the other hand, the land they wanted the use of was the low-lying land upon which logs floated and lodged during the driving stage of water. In 1878 $100 for twenty-odd acres of the character of this land was a good price.

The court can take judicial notice of the fact that the Wisconsin river is a navigable stream. The defendant therefore had the right to use it for logging purposes up to the ordinary high-water mark. *Diana Shooting Club v. Husting,* 156 Wis. 261, 145 N. W. 816. They were under no necessity to purchase anything lying below such mark for logging purposes. What they required was land lying above ordinary high-water mark, and their conveyance must be held to begin at such mark and to extend one rod further. By ordinary high-water mark is meant the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark by erosion, destruction of terrestrial vegetation, or other easily recognized characteristics. *Lawrence v. American W. P. Co.* 144 Wis. 556, 562, 128 N. W. 440. In view of these facts, and especially in view of the purpose of the grant and the practical construction given the conveyance for over twenty-seven years by the parties thereto, we reach the conclusion that one rod in width from

ordinary high-water mark was meant. Such construction harmonizes with the purpose for which the land was bought, with the purchase price, with the language used, and with the practical construction given the conveyance by the parties. If it meant from a normal stage of water, the provision that it should include bayous leading into the Wisconsin river would become meaningless, since there are no bayous on lots 1 and 2 in a normal stage of water.

In view of the erroneous instruction of the court as to where the one-rod strip began, and in view of the fact that the record does not disclose how far one rod from ordinary high-water mark along the bayous would carry defendant's boundary, the judgment must be reversed and the case sent back for a new trial.

By the Court.—Judgment reversed, and cause remanded for a new trial.

KELLEY and another, Respondents, vs. HAYLOCK and another, Appellants.

April 15—May 23, 1916.

Workmen's compensation: What employers are within the act: Temporary employment of more than four men: Farmers.

1. In the Workmen's Compensation Act (sub. 2, sec. 2394—5, Stats.) the language "every employer of four or more employees in a common employment" was intended to include only such employers as ordinarily or for some considerable length of time employ four or more employees in a common employment; and mere temporary, though regularly recurring, employment of four or more men for a specific purpose does not bring the employer within the act.
2. Thus, the employment by a farmer of more than four men for limited times in threshing, corn shredding, silo filling, or tobacco work does not bring him within the Compensation Act.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action under the Workmen's Compensation Act to set aside an award of the *Industrial Commission* for $366.46 against *Henry Kelley* and *Elmer Thronson* rendered in favor of *Elmer Haylock,* an employee of *Kelley.* The circuit court set aside the award on the ground that none of the parties were under the Compensation Act, and from a judgment entered accordingly *Elmer Haylock* and the *Industrial Commission* appealed.

For the appellant *Industrial Commission of Wisconsin* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

For the respondent *Kelley* the cause was submitted on the brief of *Thos. S. Nolan* and *Paul N. Grubb.*

VINJE, J. Plaintiffs are farmers. *Kelley,* in addition to running a farm, operated a silo filler, filling his own silo and those of other farmers in the fall. In operating the filler he employed less than four men except when filling his own silo. In threshing time and occasionally in tobacco work he has employed more than four men for a short time. *Haylock* was an employee of *Kelley* at the time the latter filled *Thronson's* silo on September 8, 1914. On that day he sustained an injury in the course of his employment for which the award was made. *Thronson* did not employ four or more men in the running of his farm except at threshing time and in filling the silo. On the day in question he had more than four men assisting in filling his silo. The *Commission* found that both *Kelley* and *Thronson* came under the act because they employed more than four men in threshing and corn shredding, silo filling, or tobacco work at times. The question of whether or not they did come under the act turns upon the meaning of sub. 2, sec. 2394—5, Stats., which provides that "on and after September 1, 1913, every employer of four or more employees in a common employment shall be deemed to have elected to accept the provisions of sections

2394—3 to 2394—31, inclusive." To intelligently solve such question recourse must be had to the whole scope and scheme of the Compensation Act rather than to technical definitions of particular words therein. It must be conceded that threshing, corn shredding, silo filling, and tobacco work are in the course of the usual occupation of farmers. The only question is whether such work for a limited time brings them within the act.

In legislating with reference to compensation to employees in industrial occupations the idea was to compensate employees in reasonably fixed kinds of employment, for the act required every employer coming under it to take out liability insurance or satisfy the *Industrial Commission* of his financial solvency and secure a certificate of exemption, or else forfeit $25 for every day he fails to do so. This provision alone shows that mere temporary employment of four or more men for a specific occasion was not intended to bring the employer under the act. Nearly every farmer is likely at some time of the year to employ four or more men for a short time—such as harvesting, berry picking, barn raising, corn shredding, silo filling, threshing, and occasional tobacco work. The same is true of nearly every other man of affairs who is not engaged in any regular business in which four or more employees are engaged. The legislature did not contemplate that mere temporary though regularly recurring employment brought the employer within the act. Its language must be taken in its ordinary and usual significance. In ordinary language when it is said that an employer employs four or more employees in a common employment it is meant that he usually does so, or that he does so most of the time, so that such employment becomes the rule and not the exception. The act operated upon and was intended to include only such employers as ordinarily or for some considerable length of time employ four or more employees in a common employment. In defining the term "employee" in sub. (2), sec.

2394—7, the legislature excluded those whose employment was but casual or not in the usual course of trade, business, profession, or occupation of his employer, showing that even if the employer was within the act his employee would not be if his employment was but casual or not in the usual course of his employer's business. There is much greater reason for holding that an employer does not come under the act unless his employment of four or more employees in a common employment continues for some considerable length of time so that he may reasonably be said to be such an employer. The operation of the act as to the employer is limited to the usual rather than to the unusual condition of a business, trade, or occupation.

The trial court held that the award should be set aside because neither *Kelley* nor *Thronson* were employers within the act. We think such construction was correct.

By the Court.—Judgment affirmed.

CAMPBELL and another, Respondents, vs. GERMANIA FIRE INSURANCE COMPANY OF NEW YORK, Appellant.

May 2—May 23, 1916.

Appeal: Questions of fact: Harmless errors: Evidence: Temporary exclusion: Waiver of right to introduce: Witnesses: Refreshing memory: Conspiracy: Admissions: Weight: Instructions to jury: Fire insurance: Fraud: Removal of property: Destruction in new location.

1. Findings by a jury, approved by the trial court, will not be set aside on appeal if supported by any believable evidence,—that is, unless the evidence is contrary to all reasonable probabilities; and so long as there is a state of evidence requiring conflicting probabilities to be considered, a jury determination either way cannot be said to be against all reasonable probabilities.

2. Where the court temporarily sustained an objection to a question because of want of sufficient foundation therefor, but indicated that the evidence might be admissible later, saying that the right to recall the witness might be reserved, and, although the basis for the question was thereafter much strengthened, the witness was not recalled, the right to have such question answered was waived.
3. This court will not reverse a judgment because of the rejection of evidence, unless its materiality clearly appears and it likewise appears that the exclusion might have affected the result unfavorably to the party complaining.
4. In an action on a fire insurance policy, plaintiff having testified that a list of articles claimed to have been destroyed was correct when made by her and defendant's agent shortly after the fire and that a paper she had was a correct copy thereof, and the absence of the original having been satisfactorily explained, it was proper to allow her to use such copy to refresh her memory or to read from it, or to allow it to be introduced as part of her evidence.
5. Where a case is submitted for a special verdict, the court may properly refuse to give requested instructions which are worded as if the verdict was to be a general one.
6. An instruction, in an action on a fire insurance policy, that "you will recall the evidence that a great many articles of personal property were totally destroyed and that some articles were not destroyed but were damaged," is *held* to be in accord with the evidence and not to involve the suggestion that none of the articles of personalty were saved.
7. Where the nature of an alleged confession—in this case a confession by a husband to the fire marshal that he and his wife had set the fires which destroyed their insured property—was such as to arouse a suspicion that it was not made freely and intelligently, and the circumstances under which it was made were consistent with that view, there was no prejudicial error in instructing the jury that the alleged admissions were not entitled to weight unless the jury were satisfied that they were freely made and not under such compulsion, threats, intimidation, promises of immunity, or persuasion as to prevent him from being a free agent in the matter.
8. The husband in such case must have known that if the fact were established that he and his wife set the fires it would be fatal to the full accomplishment of any conspiracy by them to burn the property and collect the insurance; hence, on the theory that a confession by him would evidence an abandonment of the conspiracy, it was not error, in an action by the wife on the insur-

ance policy, to instruct the jury that if such a conspiracy was formed, as claimed by the defendant, but had been abandoned by the husband before the alleged confession was made, no weight should be given to the evidence of such confession.

9. Where a fire insurance policy provided that property removed from its insured location on account of a fire should be deemed covered by the insurance in its new location for a period of five days, furniture and goods which were removed from a burning house (their insured location) and stored in a barn on the premises, and there destroyed by fire three days later, were within the recoverable loss.

APPEAL from a judgment of the circuit court for Pepin county: GEORGE THOMPSON, Circuit Judge. *Affirmed.*

Action to recover on a fire insurance policy dated May 29, 1911, issued by the defendant to one Alfred Campbell on a dwelling house, the furniture therein, and a barn and personalty therein. The property was originally insured for $1,500, but the amount was afterwards increased to $1,200 on the house and $1,000 on furniture therein, $250 on the barn, and $100 on contents of the barn. Later, Campbell duly sold and transferred the insured property to his wife, the plaintiff *Mary E. Campbell,* and duly assigned his interest in the policy to her, which was consented to by defendant. By the terms of the policy, the loss, in case of there being any, was made payable to B. M. Catura, mortgagee, as his interest might appear, and plaintiff *William Catura,* when the loss occurred, was owner of the mortgage interest. About October 21, 1912, the buildings and part of the contents were destroyed by fire and proofs of loss were made, claiming a liability of defendant to the amount of $2,550. This action was brought to recover the same, all facts being alleged in the complaint necessary thereto.

Defendant answered, pleading breach of a condition of the policy, rendering it void in case of any fraud or false swearing by the assured touching any matter relating to the insurance or the subject thereof, either before or after a loss, such breach consisting of plaintiff *Campbell* knowingly represent-

ing that the fire originated from an unknown cause when she knew that she, with the aid of her husband, set fire to the property, purposing to destroy it and to collect the insurance of defendant, claiming a sum largely in excess of its value or of the damage thereto.

Defendant further pleaded in defense a breach of the aforesaid condition in that plaintiff *Campbell,* in her proofs of loss, knowingly greatly overstated the value of the property covered by the policy and overstated the loss of and damage thereto.

Defendant further pleaded failure of plaintiff *Campbell* to use all reasonable means to save and preserve the property at and after the fire, under a provision of the policy exempting defendant from any loss occasioned by any such failure.

Defendant further pleaded that plaintiff *Campbell,* and her husband, conspired to obtain insurance on the property for an amount greatly in excess of its value and then to burn the same and that, in furtherance of such conspiracy, they set the fire.

There was evidence to this effect: The dwelling house was a two-story structure, divided into seven rooms on the first floor and three on the second. It was occupied by the Campbell family. October 19, 1912, while one Bein, and his son, were there to fix a chimney, he assisted in putting up a wood heating stove in the parlor. The pipe led to the story above through a thimble and then to the chimney. A fire was started in the stove about 11 o'clock. At dinner time the odor of smoke was observed and shortly thereafter smoke was seen issuing from the upper windows. Neighbors assembled and much of the furniture was removed. Bein and others put out the fire and investigated its origin, Bein cutting a hole in the roof for that purpose. There were indications that it started at the thimble in the floor. There was conflicting evidence as regards whether kerosene or gasoline had been used in the vicinity of where the fire started and other places. After the fire was put out, Mr. Campbell went to a grist mill. About 5 o'clock p. m. the house, in the upper

part, was observed to be on fire again. In the meantime most of the things which were removed on the occasion of the first fire had been put back into the house, but largely on the first floor. *Mrs. Campbell's* preserved fruit had been removed from the cellar and not put back. A trunk, packed with clothes, belonging to her and the children and weighing some 200 pounds, was carried out on the porch before the first fire. It was said to have been prepared by *Mrs. Campbell* to take with her, in a few days, on a visit to her father. The trunk and contents were saved. Bein and others again investigated as to the origin of the fire, he going down through the hole he had previously cut in the roof. The fire was found near the thimble and was put out. There was conflicting evidence as to whether Mr. Campbell was there and as to whether there were indications of gasoline or kerosene having been used. There was evidence to the effect that Campbell did not return from his trip to mill until after the second fire. About 10:30 o'clock at night, fire broke out in the upper part of the house a third time, resulting in complete destruction of the building. There were twenty minutes or so when it was feasible to remove things from the lower part of the house. There was further evidence to this effect: Much of the furniture was removed from the lower room. *Mrs. Campbell's* time was taken up largely with her children. Mr. Campbell was a cripple. The work of saving things was done by the neighbors. The next Monday morning the barn burned down. The night before, Campbell took a horse therefrom and put it into a neighbor's barn. He was advised to do so, particularly, by a neighbor, because of danger of the barn taking fire from the smouldering ruins of the house. Campbell was in bed when the fire started. It might have caught from sparks or brands carried to it by the wind from the ruins of the house fire. Some time after the fires occurred, *Mrs. Campbell* and her husband were examined, apart from each other, in respect thereto, by the attorney for the state

fire marshal. The marshal was present. *Mrs. Campbell* related the circumstances of the fire. The evidence was conflicting as to what occurred. She claimed that the examiners endeavored to intimidate her into confessing that she was instrumental in starting the fires and had not told the truth in stating that she did not know how they originated, and tried to induce her to sign a statement they prepared without her knowing its contents. At the examination of Mr. Campbell, according to the testimony of the fire marshal's attorney, he freely and unhesitatingly and without being urged to do so, said he and *Mrs. Campbell* set the fires in the house, using kerosene in doing so, and that he, later, set fire to the barn. He signed a statement to that effect. Some time afterwards the fire marshal again examined the Campbells, at which time *Mrs. Campbell* adhered to what she said on the previous occasion, and Mr. Campbell changed his attitude in respect to the matter. After the last examination, the Campbells were arrested on the charge of having set the fires. On the hearing before the examining magistrate, the fire marshal testified to what occurred between him, his attorney, and the Campbells. Such attorney did not testify. He aided the district attorney. The result was that the Campbells were discharged. On the trial of this case, the fire marshal's attorney testified to what the marshal did at the inquest and the latter was not called. There was a conflict as to whether the proofs of loss included things which were saved from the fire. *Mrs. Campbell* testified that it did not; that the agent of defendant soon after the loss occurred, assisted her in making the list of property burned and that they made it as accurately as they could. Absence of that list was so satisfactorily explained that she was permitted to use, to refresh her memory, what she testified was a correct copy after having testified that when the original was made she knew it was correct or substantially so. By using the copy she testified, in detail, to the articles of personalty lost. She also testified, at length, to the circumstances of the fires, positively denying all

knowledge of their origin and explaining or denying all statements of witnesses as to suspicious circumstances. There was considerable corroborating evidence in her favor, and a conflict in the evidence on all points submitted to the jury. The contested matters upon the evidence were submitted with the following result:

(1) Plaintiff *Campbell* suffered a loss by the fires in question, on personalty insured, in the sum of $1,210.75. (2) She did not, in her proofs of loss, knowingly swear falsely as to the value of the personal property described in the policy, or as to the loss occasioned by, or origin of, the fires. (3) The fires which resulted in such loss were not caused by her voluntary act, assent, procurement, or design. (4) She did not neglect to use every reasonable means to save and preserve the property at and after the fires.

No objection was made to the questions submitted, or request made to submit additional questions.

Defendant took appropriate steps to save for review the matters referred to in the opinion.

Judgment was rendered in favor of the plaintiffs for the loss covered by the policy in conformity to the verdict of the jury.

For the appellant there was a brief by *Charles B. Obermeyer, E. S. Pattison,* and *C. A. Ingram,* and oral argument by *Mr. Ingram* and *Mr. Obermeyer.*

W. E. Plummer, for the respondents.

MARSHALL, J. No time need be spent on whether any of the findings of fact are contrary to the evidence. We are relieved therefrom because, as indicated in the statement, there was a conflict of evidence on all material issues, requiring them to be submitted to the jury, and because counsel for appellant concede in their brief, as they did on the oral argument, that such is the case. The most claimed is that there are findings, vital to the judgment, which are against the great preponderance of the evidence. If that were so, it

would not warrant setting aside the decision by the jury, confirmed, as it was, by the trial judge.

No rule is more firmly established than that findings by a jury, approved by the trial court, are proof against attack here, if supported by any believable evidence, in any reasonable view of it. An appearance, by the history of the trial, that such findings are against the preponderance, or the great preponderance of the evidence, is unimportant, unless such preponderance so conclusively proves the contrary of such findings as to leave no jury question in respect to the matter.

In view of the foregoing, it must be held that the findings here are to be regarded as verities. On the question of whether there is any believable evidence to sustain a verdict, this court has said there is not when it is contrary to all reasonable probabilities, *Meyer v. Home Ins. Co.* 127 Wis. 293, 106 N. W. 1087; but so long as there is a state of evidence requiring conflicting probabilities to be considered, a jury determination either way cannot be said to be against all reasonable probabilities, even though the evidence of one witness,—unimpeached by matters of common knowledge, or conceded facts, or established physical situations,—stands opposed by the evidence of several witnesses. That is the effect of *Badger v. Janesville C. Mills,* 95 Wis. 599, 70 N. W. 687; *Roth v. S. E. Barrett Mfg. Co.* 96 Wis. 615, 71 N. W. 1034; *Flaherty v. Harrison,* 98 Wis. 559, 74 N. W. 360; *Wunderlich v. Palatine F. Ins. Co.* 104 Wis. 382, 80 N. W. 467; *Samulski v. Menasha P. Co.* 147 Wis. 285, 133 N. W. 142.

In the last case cited, the rule that evidence on one side of a controversy will warrant setting aside, on appeal, of a jury finding in favor of the other, was confined to instances where the finding is contrary to unquestionable physical situations or common knowledge, or conceded facts. Mere weight of probabilities or inferences against the findings is not sufficient. It is needless to add that the situation here does not satisfy that test, and that the judgment must be regarded as

right unless some error was committed on the trial which may probably have influenced the jury unfavorably to appellant.

Mr. Bein, who testified to having discovered the place of origin of the second fire and put it out, said that when he reached such place, Alfred Campbell was near by and he had a conversation with him. Evidence had already been introduced respecting some suspicious circumstances indicating that the fire was of incendiary origin and that Campbell and his wife might be the guilty parties. In that situation, Bein was twice asked, "Did you have a conversation with him at that time?" and the witness answered in the affirmative. He was then asked, "What was that conversation?" The court finally sustained an objection to the question for want of sufficient foundation therefor, indicating that the evidence might be admissible further on by saying, "You may, however, reserve the right to recall the witness later." That right was not exercised. It is contended that prejudicial error was committed at this point.

The inquiry and objection mentioned presented a question of competency. The court did not exclude the proffered evidence, except temporarily. As counsel did not return to the subject, though the basis therefor was much strengthened and the door was carefully left open therefor, it must be held that the matter was waived. Moreover, the nature of the question was such that, in the most favorable light for appellant, prejudicial error does not affirmatively appear. The question did not necessarily suggest that the conversation was in respect to any circumstance of a criminating nature. There was no suggestion in it, or aside, to indicate the materiality of the conversation. This court will not reverse a judgment because of the rejection of evidence, unless its materiality clearly appears and it likewise appears that the exclusion might have affected the result unfavorably to the party complaining.

It is further contended that error was committed because

Mrs. Campbell was permitted to testify to the amount of the loss she sustained, using a copy of the list of articles claimed to have been destroyed which she and appellant's agent made shortly after the fire. She testified, as indicated in the statement, in effect, that she knew the original list was correct when made and that the paper she used to testify from was a correct copy thereof, and satisfactory proof was made as to absence of such original. Under those circumstances it was proper to allow her to use the copy to refresh her memory, or to read from it, or to allow it to be introduced as part of her evidence. *Bourda v. Jones,* 110 Wis. 52, 58, 85 N. W. 671; *Manning v. School Dist.* 124 Wis. 84, 102 N. W. 356; Jones, Ev. §§ 877 to 881, inclusive.

Several instructions requested which the court refused to give, were worded appropriately for submission of the case for a general verdict. They were in form that, if the jury believed from the evidence specified things "the plaintiff is not entitled to recover in this action," or "your verdict should be for the defendant." The form of the requests warranted their rejection. *Johnson v. St. Paul & W. C. Co.* 126 Wis. 492, 105 N. W. 1048; *Howard v. Beldenville L. Co.* 129 Wis. 98, 108 N. W. 48; *Odegard v. North Wis. L. Co.* 130 Wis. 659, 110 N. W. 809. The trial court gave instructions applicable to each of the special questions and no additional instructions of that character were requested which were not sufficiently covered by those which were given.

Complaint is made because the court, in instructing the jury on the question relating to the amount of loss, said: "You will recall the evidence that a great many articles of personal property were totally destroyed and that some articles were not destroyed but were damaged." It is said that such language involved the suggestion that none of the articles of personalty were saved. It does not seem so. The instruction was in exact accord with the evidence. If counsel for appellant supposed that any explanatory instruction was

necessary to guard against the jury being misled, they should have requested such. It does not appear that there was any such danger.

The jury were instructed that the alleged admissions of Campbell were not entitled to weight unless the jury were satisfied that such admissions were freely made and not under such compulsion, threats, intimidation, promises of immunity, or persuasion, as to prevent him from being a free agent in the matter. Complaint is made of that, solely upon the ground that there was no evidence warranting it. The admissions claimed, as indicated in the statement, amounted to a confession by Campbell to a public official that he and his wife were guilty of the crime of arson in respect to the destruction of the property. The instructions, in the abstract, were correct. *Keenan v. State,* 8 Wis. 132; *Connors v. State,* 95 Wis. 77, 69 N. W. 981; *Hintz v. State,* 125 Wis. 405, 104 N. W. 110. The circumstances under which the alleged confession was made furnished some basis for the cautionary instructions. Probably the character of Campbell had something to do with the matter. He was called from his working place in the woods by a state official and his attorney, and, in a room away from his wife, who was likewise called, and apart from any one else, he was subjected to a long investigation. The nature of the alleged confession probably aroused suspicion as to its having been given freely and intelligently. According to the witness who testified on the subject, Campbell rather volunteered to accuse himself and his wife, with whom he was living agreeably, of having committed a most serious crime. Notwithstanding the witness testified that the confession was freely made, the circumstances were consistent with a contrary view. *Mrs. Campbell,* who was examined by the investigator about the same time, testified that an effort was made to intimidate her and to entrap her into signing a statement they had prepared, without her knowing its contents. Under all the circum-

stances, it seems it was not prejudicial error, if error at all, to give the instructions. The jury heard the evidence. They were not obliged to believe it. They were left entirely free to pass thereon and to give due weight thereto in case of their coming to the conclusion that the conditions mentioned in the instructions were satisfied.

The jury were instructed that if a conspiracy was formed to burn the property and collect the insurance, as defendant claimed, but it had been abandoned by Campbell before the alleged confession was made, no weight should be given to the evidence of such confession. As matter of abstract law, that is correct. *Miller v. State,* 139 Wis. 57, 89, 119 N. W. 850. "When the common enterprise is at an end, whether by accomplishment or abandonment, no one of the conspirators is permitted, by any subsequent act or declaration of his own, to affect the others." Wharton, Crim. Ev. (9th ed.) sec. 699. True, in case of such a conspiracy as is claimed to have existed here, the common design cannot be said to have been accomplished until the insurance shall have been obtained. If counsel for appellant had desired the instruction given to be accompanied by an explanatory feature, they should have requested it. There was certainly evidence of an abandonment by Campbell of the fraudulent design, if one had been formed, as claimed. If he confessed to having, in concert with his wife, set the fires, he must have known that if such were established to be the fact, it would be fatal to the full accomplishment of such design. Doubtless it was upon the theory that such a confession would evidence an abandonment of the conspiracy that the instruction was given. So looking at the matter, which we think is a reasonable view to take, there was a sufficient basis for the instruction to preclude condemning the giving of it as fatal error.

No question is raised but what all the property destroyed was covered by the policy of insurance. It was conceded on the argument that such was the case, but whether such property as was removed from the house and stored in the barn on

the premises and there destroyed was within the recoverable loss, counsel, when interrogated in respect to the matter on the argument, did not seem prepared to affirm or deny, but it seems to be definitely covered by the policy. That contains a provision to the effect that, property removed from its insured location on account of a fire shall be deemed covered by the insurance in its new location for the period of five days. It may well be that considerable of the furniture and goods which were in the house were removed therefrom and stored in the barn and there destroyed. There is evidence that such was the fact. . That tends, strongly, to harmonize the evidence as to the amount of things removed from the house and with the articles claimed to have been destroyed It makes no difference which place they were in when burned, in view of the terms of the policy and the finding that respondent *Campbell* complied with the requirement to use all reasonable means to save and preserve the property at and after the fire. It is quite likely that a considerable of the things removed from the house were, on the Sunday following, stored in the barn and shed attached thereto, and, since a watch was kept for a considerable time after the house fire had practically died down, that the barn and shed were reasonably thought to be a fairly safe storage place until the following Monday. The removal of the horse from the barn is not necessarily fatal to that view, as the difficulty of handling such an animal in case of the barn where it is located being on fire is notorious. The goods, it seems, were stored mostly in the shed. Witnesses testified that they remained at the ruins of the house all night, and the next day until a drizzling rain set in and they supposed there was no danger of the ruins setting fire to anything else, and that they "helped to put a lot of stuff which had been out all night into the shed." In the face of the uncontroverted evidence on that subject, the evidence to the effect that no such amount of property was destroyed by the burning of the house as was described in the proofs of loss, does not go very far toward impeaching such

proofs or convicting *Mrs. Campbell* of having knowingly testified falsely. The real effect of her evidence is that the goods were destroyed by the fires, not, necessarily, that they were all destroyed by the fire which burned the house.

The foregoing covers all suggestions of counsel which seem to merit special mention. We find no clearly harmful error, if error at all, in the record.

By the Court.—The judgment is affirmed.

ZENTZIS, Appellant, vs. ZENTZIS, Respondent.

May 2—May 23, 1916.

Divorce: Foreign judgment: Jurisdiction: Faith and credit: Division of property: Ancillary action in this state: Real property of wife derived from husband.

1. A judgment of divorce granted in another state in an action between parties domiciled there and after personal service of the summons and complaint on the defendant, so that the court had jurisdiction both of the subject matter and of the parties, must be given full faith and credit in this state and is binding upon the defendant husband as to all rights that inhered in and arose out of the marital relation. *Cook v. Cook*, 56 Wis. 195, distinguished.
2. Where no provision was made in such a judgment for alimony or a division of property the defendant husband cannot, in an ancillary or an independent action in this state, obtain a division of, or recover an interest in, real property located here which he had, prior to the divorce action, conveyed to his wife.
3. The defendant might, in the divorce action, have asked to have his rights in such real property determined and adjudicated; and the court of the other state might, as a condition of granting relief to the plaintiff wife, have required her to reconvey such property, or a part thereof, to the husband.

APPEAL from an order of the circuit court for St. Croix county: GEORGE THOMPSON, Circuit Judge. *Affirmed.*

The action is brought to recover an interest in property

deeded to defendant by plaintiff while they were husband and wife. After such transfer the defendant secured a divorce from the plaintiff in the state of Montana. The Montana court made no express mention of a final division of the defendant's property nor did it in any way mention the property rights of the parties arising out of their marital relations.

The plaintiff and defendant were married in 1897 and resided in St. Croix county until the spring of 1912, when they moved to Montana. In 1901 the plaintiff purchased forty acres of land and in 1908 another eighty acres. He then transferred the title of the entire 120 acres by deed to the defendant, his wife. In March, 1912, the land was leased to one Olson by the defendant and the parties moved to Montana. In the year 1914 the defendant secured a divorce from the plaintiff in the state of Montana. The summons and complaint in the divorce action were personally served on the plaintiff within the state of Montana, where the parties then resided. At the time the papers were served on him the plaintiff consulted an attorney of Montana and was advised that any judgment rendered in the divorce action could not affect the plaintiff's rights and property in Wisconsin. The plaintiff did not appear to defend the divorce action. The Montana court awarded the wife judgment of divorce on the grounds of the failure to support, idleness, and dissipation of the husband and awarded the custody of the two minor children of the parties to the wife. The judgment, however, is silent in regard to alimony and division and distribution of the husband's property.

The circuit court for St. Croix county sustained a demurrer to the complaint on the ground that the complaint does not state facts sufficient to constitute a cause of action. From such order this appeal is taken.

Jos. W. Singleton, for the appellant.

Spencer Haven, for the respondent.

SIEBECKER, J. The plaintiff alleges that he has an interest in the farm in question, located in this state, and he asserts the legal right to recover his alleged interest in this land by action independent of the divorce action in the Montana court, wherein a judgment of absolute divorce was awarded upon the complaint of the wife. At the time of the proceeding in the divorce action in Montana the husband and wife were domiciled in that state. The divorce action was commenced by the wife against the husband, the plaintiff in this action, by the service of the summons and complaint on him personally under the law of Montana. After such service of the summons and complaint on him and his consultation with an attorney of Montana he did not appear or answer in the action, and the wife, upon her complaint and the evidence adduced by her, was awarded a judgment dissolving the bonds of matrimony and granting her the custody of the two minor children, the fruit of such marriage. There is no provision in such judgment for alimony or for a final division or distribution of the husband's estate.

It is manifest that the Montana court obtained jurisdiction of the parties to the divorce action and of the subject matter of the action. These facts make the judgment of the Montana court binding on the husband as to all the rights that inhered in and arose out of the marital relations. The husband, the plaintiff in the instant action, being domiciled in Montana when he was served with process in the divorce action, was properly subjected to the process of the Montana court and is bound by the judgment pronounced against him by that court. Under these facts and conditions a judgment of a sister state must be given faith and credit in Wisconsin under sec. 1, art. IV, Const. of U. S. *D'Arcy v. Ketchum,* 11 How. (52 U. S.) 165; *Pennoyer v. Neff,* 95 U. S. 714.

Much reliance is placed on the case of *Cook v. Cook,* 56 Wis. 195, 14 N. W. 33, 443, to sustain the contention plaintiff makes in this court that the divorce judgment of the Mon-

tana court in no way affected his rights and interests in this farm, because no final division and distribution of real estate in Wisconsin could be awarded by the Montana court, and that such court in fact did not attempt to grant such relief. The *Cook Case* is not an authority on this point. In that case the husband, who resided in Michigan, had secured a judgment of divorce in an action in Michigan against his wife, who resided in Wisconsin. The wife had not been personally served with notice and did not appear in the action and was ignorant of the action until after judgment, and it appeared that the husband obtained the judgment upon notice by publication under the Michigan law, based upon affidavits which the husband knew to be false and upon an alleged cause of action which was false in fact. This court held that the judgment obtained in such a proceeding was not a bar to a subsequent action by the wife for a divorce, alimony, and division of the husband's estate in this state. As declared in the opinion under the citation of *Doughty v. Doughty,* 28 N. J. Eq. 581:

"A decree in a divorce suit will have no extraterritorial effect when the defendant is domiciled in another state, and is not served with process nor with notice of the proceedings. A decree for divorce, to be entitled to extraterritorial effect, when the person of the defendant is without the jurisdiction, must be obtained in a manner consistent with natural justice, and such decree is enforced in another state only on the ground of comity."

It is obvious that the plaintiff here does not stand in the favorable position of the wife in that case. Nor can he rely on the principle of comity in the treatment of the Montana divorce judgment in Wisconsin, because it appears that he was domiciled in Montana and was personally served with process in that state, which subjected him to the jurisdiction of the Montana court. In the light of these facts the provision of sec. 1, art. IV, of the United States constitution

commands the courts of this state to give such judgment full faith and credit.

It is claimed that at all events plaintiff, as a party to the action in the Montana court, is bound only to the extent that such court adjudicated upon his rights in the divorce judgment, and that such court neither attempted nor possessed the power to determine his rights in the real estate situated in this state which he conveyed to his wife before she secured the divorce. The allegations of this plaintiff are that the complaint and judgment in the divorce action are silent as to this property and hence his rights therein are not affected thereby, and he therefore asserts the right to enforce a division and distribution thereof in this action in this state. The argument is made that such action in this state is in its purpose and object ancillary to the Montana divorce action to secure a completed determination as to this property arising out of their marital rights. The right to a division and distribution of the husband's estate in a divorce action is defined by statute. Sec. 2372, Stats., provides:

"No judgment nullifying a marriage or for a divorce of any kind shall in any way affect the right of a wife to the possession and control of her separate estate, real or personal, except as provided in this chapter; and nothing contained in this chapter shall authorize the court to divest any party of his title in any real estate further than is expressly provided herein."

Sec. 2364, Stats., authorizes a court in a divorce action to adjudge to the wife alimony and allowance for support, maintenance, and education of the children committed to her custody, and "the court may finally divide and distribute the estate, both real and personal, of the husband *and so much of the estate of the wife as shall have been derived from the husband,* between the parties and divest and transfer the title of any thereof accordingly, . . ." There is a well recognized practice that an award of alimony is subject to modification at any time by the court that awarded it or by an independ-

ent action in another court in either the same state or a foreign state, but such power to revise and alter a judgment for alimony does not apply to judgments in divorce actions making a final division and distribution of the husband's estate. Such a judgment cannot be reviewed or altered in this state after the term of court in which it was rendered. *Bacon v. Bacon,* 43 Wis. 197; *Cook v. Cook,* 56 Wis. 195, 14 N. W. 33, 443; *Kistler v. Kistler,* 141 Wis. 491, 124 N. W. 1028; *Lally v. Lally,* 152 Wis. 56, 138 N. W. 651.

The rights plaintiff asserts to the land in question arise under the provisions of sec. 2364, Stats., which must be adjudicated in the divorce action. He did not, upon being summoned by the court of Montana to appear and defend his rights arising out of the marital relation, the subject matter of the action, ask to have his rights determined and adjudicated. The claim that the court of Montana had no jurisdiction to adjudicate those rights is not well founded. We must presume that the Montana court possesses the power to adjudge these matters in divorce actions, and such power of that court is not challenged here. Nor is there merit in the claim that the court of Montana could not effectually grant a division and distribution between the husband and wife of real estate located in this state because it was powerless to transfer an interest therein and could not effectually grant relief which conflicted with the title vested in his former wife by the deed from the husband conveying to her an absolute fee. True, that court could not by force of a decree transfer an interest in lands in this state, but since it had jurisdiction of the person of the plaintiff's wife, who was a suitor in such court, the court could impose relief by way of a division and distribution of this plaintiff's estate, including Wisconsin real estate, by requiring, as a condition of granting the wife any relief in the divorce action, that she make a transfer of this property vested in her wheresoever located. *Dickson v. Loehr,* 126 Wis. 641, 106 N. W. 793, and cases cited. This

doctrine is clearly recognized in *Pennoyer v. Neff,* 95 U. S. 714:

"Thus the state, through its tribunals, may compel persons domiciled within its limits to execute, in pursuance of their contracts respecting property elsewhere situated, instruments in such form and with such solemnities as to transfer the title, so far as such formalities can be complied with; and the exercise of this jurisdiction in no manner interferes with the supreme control over the property by the state within which it is situated" (citing).

The allegations of the complaint do not constitute a cause of action for relief in the courts of this state and the trial court properly sustained the demurrer to the complaint.

By the Court.—The order appealed from is affirmed.

NICKEL, Appellant, vs. CHAPMAN and another, Respondents.
SAME, Respondent, vs. SAME, Appellants.

May 2—May 23, 1916.

Boundaries: Evidence: Competency: Waiver of objections: Surveyor's plat: Ejectment: Judgment: Verdict as to land not in suit: Costs.

1. In ejectment, the question being as to the original location of a section corner, testimony of old settlers as to its location, which was corroborative of evidence of defendants' surveyor locating the line in connection with permanent monuments and visible marks or indications left on natural objects indicating the lines and boundaries of the government survey, was competent.
2. Even if such evidence were incompetent, by first putting in similar evidence plaintiff opened the door for it and waived any objection to its admission.
3. A plat made by defendants' surveyor, who testified that he made it and that it was correct and correctly represented the corner in dispute and other lines and points thereon, including a highway, was competent in connection with the other evidence in such case.
4. The admission of testimony of the surveyor to the effect that he came to the center of a highway at forty chains, and as to what parties said about having seen witness trees at that place and pointing them out, was not in this case prejudicial error.

5. In ejectment, where the jury found in favor of defendants as to the land in dispute, plaintiff was not entitled to judgment for an adjoining piece of land which the jury found belonged to him but which was not included in the complaint and was conceded, without controversy, to be his, although it had been inclosed with defendants' land by a fence built by consent of both parties.

6. Where, as a condition of having a new trial in ejectment, defendants were required to pay the costs of a former trial, they were not entitled, upon recovering in the new trial, to tax said costs of the former trial against the plaintiff.

APPEALS from a judgment of the circuit court for St. Croix county: GEORGE THOMPSON, Circuit Judge. *Affirmed.*

This is ejectment to recover a strip of land about fourteen rods in width off the south side of the southeast quarter of the southeast quarter of section 11, township 31 north, range 16 west. Plaintiff owns the southeast quarter of the southeast quarter of section 11 and defendants own the northeast quarter of the northeast quarter of section 14 in township 31 north, range 16 west.

The question involved is the original location of the southeast corner of section 11. The case has been tried three times. The first trial resulted in a verdict for the defendants. A second trial under the statute resulted in a verdict for plaintiff. A third trial was granted on motion of defendants on terms and resulted in a general verdict for the defendants on the location of the section line. A special question was also submitted to the jury and answered as follows: "*Q.* How far is it between the west end of the defendants' fence and the west end of the section line as claimed by the defendants? *A.* Twelve and one-half feet."

There was a motion for new trial by plaintiff and also for judgment for the triangular strip above mentioned. These motions were denied, and the court rendered judgment in favor of the defendants dismissing the plaintiff's complaint, with costs. Both parties appealed.

For the plaintiff there was a brief by *Kennedy & Yates,* and oral argument by *W. T. Kennedy* and *N. O. Varnum.*

For the defendants there was a brief by *McNally & Doar,* and oral argument by *W. F. McNally* and *W. T. Doar.*

KERWIN, J. Several errors are assigned which will be treated in their order.

1. It is first contended that error was committed in the admission of evidence.

Both parties introduced evidence of surveyors as to the location of the section line between sections 11 and 14. The evidence of the plaintiff's surveyors fixed the line as claimed by plaintiff, while the evidence of defendants' surveyor located it as claimed by the defendants. The surveyors on both sides seem to have been guided in their surveys by monuments and measurements made with reference thereto.

Early in the trial counsel for plaintiff inquired whether counsel for defendants intended to offer testimony of old settlers as to location of the corner in dispute. The court replied: "The court cannot anticipate what the evidence shall be, the character of the evidence that defendants may offer. It appears to me the safe course to pursue is to follow the general rule and the plaintiff to go on and prove what he expects to rely on in the case." Counsel for defendants then stated: "In order that there may be no misunderstanding or misconception, although not required to do so, I will say now that we will offer testimony of old settlers as to the location of the disputed corners and other corners. What the character of that testimony will be I do not suppose the court can anticipate in advance."

Counsel for plaintiff in making the plaintiff's case put in evidence similar to that he complains of here. Plaintiff thus opened the door for this class of evidence; having done so he cannot complain that defendants put in similar evidence. *Hartung v. Witte,* 59 Wis. 285, 18 N. W. 175.

But the evidence was competent. It was corroborative of the evidence of the defendants' surveyor locating the line in

connection with permanent monuments and visible marks or indications left on natural objects indicating the lines and boundaries of the government survey. *Racine v. Emerson,* 85 Wis. 80, 55 N. W. 177; *Nys v. Biemeret,* 44 Wis. 104; *Brew v. Nugent,* 136 Wis. 336, 117 N. W. 813.

It is claimed that the court erred in receiving in evidence a plat made by the defendants' surveyor. He testified that he made the plat and that it was correct and correctly represented the southeast corner of section 11 and other lines and points represented thereon, including a highway. This plat was competent in connection with other evidence in the case.

Error is also assigned upon the reception of evidence of the surveyor to the effect that he came to the center of a highway at forty chains, and as to what parties said about having seen witness trees at that place and pointing them out. We are convinced that no prejudicial error was committed in the admission of the evidence complained of by appellant under this head.

2. Counsel for plaintiff also except to the dismissal of the complaint on the ground that the plaintiff was at least entitled to judgment for the triangular piece north of the section line which the jury found belonged to plaintiff and which was inclosed by defendants' fence. The north line of this triangular piece was twelve and one-half feet north from the section line on the west side of plaintiff's land and ran to the section line on the southeast corner of plaintiff's land, the fence between the plaintiff's and defendants' land starting on the section line on the southeast corner of section 11 and running to a point twelve and one-half feet north of the section line on the west line of plaintiff's land.

It is apparent from the record that the fence was built by consent of both parties, they supposing it to be on the line, and in the present litigation there was no controversy over this triangular piece. In fact it was not considered by the court below as included in the complaint. It was never un-

lawfully withheld from plaintiff and is conceded by all parties to belong to plaintiff. The complaint in the instant case calls for a piece of land about fourteen rods wide, and the controversy in this case did not include the triangular piece twelve and one-half feet wide as found by the jury, hence there was no error in denying judgment in favor of plaintiff for the triangular strip.

3. Error is assigned for refusal to give an instruction relating to the question whether the triangular strip was twelve and one-half feet wide or thirty-three feet at the west of plaintiff's land. It is argued that the refusal to give this instruction in connection with the general charge given prejudiced the plaintiff. Error is also predicated upon the charge as to positive and negative testimony. We find no prejudicial error in the charge or in refusal to charge.

On the defendants' appeal it is insisted that the court erred in striking from the defendants' cost bill an item of $187.25. This item is the amount allowed as a condition for new trial granted to defendants. This amount being costs taxed as condition for new trial granted to defendants, on recovery the defendants were not entitled to tax these costs against plaintiff. The item was therefore properly stricken from defendants' cost bill.

By the Court.—The judgment is affirmed on both appeals.

CHARLES A. STICKNEY COMPANY, Respondent, vs. LYNCH and another, Appellants.

May 2—May 23, 1916.

Foreign corporations: Validity of contracts: Interstate commerce: Consolidation of actions: Bills and notes: Defenses: Separate contract with agent of payee.

1. A contract made in this state with an unlicensed foreign corporation, but which is not to be complete so as to be binding upon such corporation until approved at its home office outside the state, is not void under sec. 1770*b*, Stats.
2. Provisions in such contract that the foreign corporation shall furnish certain property f. o. b. in this state, and for the filling of orders for goods by such corporation and subsequent taking of securities therefor, relate to matters of interstate commerce and are not within said sec. 1770*b*.
3. There is no error in refusing to order the consolidation of actions which could not have been joined in the first instance because brought by different parties and relating in some respects to essentially different controversies.
4. In an action upon a note given to a foreign corporation for sample machines pursuant to an agency contract between defendants and the corporation, the defense being the breach of a second contract by the terms of which the traveling salesmen of the corporation who negotiated the first contract agreed to sell a certain machine for defendants or to take back said sample machines and settle with the corporation therefor, findings by the court to the effect that such second contract was the personal agreement of said salesmen and was not a part of the contract between defendants and the corporation, are *held* to be sustained by the evidence.

APPEAL from a judgment of the circuit court for St. Croix county: GEORGE THOMPSON, Circuit Judge. *Affirmed.*

Action on a $318 promissory note, made by defendants June 24, 1913, payable to plaintiff on or before one year. The complaint was in the usual form.

Defendants answered that plaintiff was a Minnesota corporation; that it had never qualified to do business in this

state; and that the note related to property within such state and affects plaintiff's personal liability.

Defendants further answered, counterclaiming that plaintiff made a contract with defendants as part of which the note and another of the same amount payable January 24, 1915, were made, with privilege, as to the second note, of renewal from year to year during the life of such contract; that under such contract defendants purchased some machinery of plaintiff and gave the notes therefor, plaintiff agreeing to sell for them within one year a certain twenty horse-power engine, or to take such machinery at the wholesale price or to settle with them for such notes; that they failed to sell said engine as agreed upon, whereupon defendants returned such machinery and demanded back the notes, which was refused. A copy of the alleged contract was made a part of the answer.

Defendants further counterclaimed, stating the facts alleged in the first counterclaim; that, after the return of the machinery to plaintiff and without defendants' consent, the former delivered to the Merchants National Bank of St. Paul, Minnesota, the second note and that it had commenced an action to recover thereon, claiming to own the same and that plaintiff wrongfully converted the note to its own use to defendants' damage in the sum represented thereby.

Judgment was asked dismissing the complaint and for damages on the second counterclaim.

The contract, as claimed in the answer, consisted of an instrument whereby defendants agreed to act as agents for plaintiff for the sale of machinery in the former's territory in Wisconsin, with business location at New Richmond in said state, and to purchase certain samples of the articles to be dealt in, and to settle therefor by the giving of two notes, being the ones mentioned in the pleadings. The instrument was signed "*Charles A. Stickney Company,* by C. A. Stickney, President, by Riplinger & Hocket, Salesmen, Lynch Brothers, Merchants." It contained a stipulation that it ex-

pressed the entire agreement between the parties and was not to be binding on plaintiff until countersigned by it by some one of its officers at St. Paul, Minnesota.

A second instrument was made, dated the same as the other, and pleaded as a part of it. Such instrument was in these words:

"New Richmond, Wis., Jan. 24, 1913.

"This is to certify that we agree to sell one 20 H. P. tractor L. H. C. Type A. between the date of this agreement and the 24th day of January, 1914. If we do not sell this tractor for Lynch Bros. as agreed herein, we agree to take the 1¾ H. P., 3 H. P., 5 H. P., 7 H. P. engines and one small pump jack off their floor and pay the wholesale price for them or settle with the *Charles A. Stickney Co.* of St. Paul, Minn., for notes they have given them for the above mentioned engines.

CHARLES A. STICKNEY CO.,
"By F. F. Riplinger,
"Martin Hocket."

The counterclaim was duly replied to. There was evidence tending to prove the facts found by the court as hereafter indicated; particularly, that the first paper, without the second, was forwarded by the sales agents to plaintiff at St. Paul for approval; that plaintiff did not know anything about the second paper until about the time of the maturity of the first note; that the first paper was made on one of plaintiff's printed blanks while the second was wholly in the handwriting of one of the sales agents; that it was made as a side and personal agreement of the sales agents, and never formed any part of the contract with plaintiff.

The court found as facts: (1) Plaintiff is a Minnesota corporation and has never been licensed to do business in Wisconsin. (2) Defendants' business place is at New Richmond, Wisconsin. (3) January 24, 1913, plaintiff's agents prepared a contract between it and defendants for a sale, by the former to the latter, of certain machinery, which was signed by the agents and defendants. It provided that it

should not be binding on plaintiff until signed and approved by one of its officers at its St. Paul office, and stated that it contained all the agreement between the parties. (4) It provided for the giving of the notes mentioned in the pleadings. (5) It was sent to plaintiff by the agents for approval, duly approved by its president, a duplicate likewise approved was sent to defendants by mail, was received by them, the machinery called for thereby was sent to and received by them, and they executed and delivered the required notes to plaintiff. (6) When the contract was prepared the salesmen drew a second paper, agreeing to sell for defendants within one year an engine then in the latter's possession, or to take the machinery purchased by defendants under their contract with plaintiff and to pay the wholesale price therefor, or to settle with plaintiff for the notes. The paper did not mention any price for the engine; it was signed by the salesmen, personally, and in front of their names, one of them wrote "*Charles A. Stickney Company,* By." The agreement was never approved by plaintiff, nor authorized by it, nor called to its attention until about the due date of the notes. (7) January 21, 1914, defendants shipped the machinery they received of plaintiff to it at St. Paul, Minnesota; but plaintiff refused to receive the same.

On such findings judgment was ordered and rendered according to the prayer of the complaint.

For the appellants there was a brief by *McNally & Doar,* and oral argument by *W. F. McNally* and *W. T. Doar.*

Spencer Haven, for the respondent.

MARSHALL, J. It is contended that the contract and notes given pursuant thereto are void under sec. 1770*b,* Stats., because plaintiff is a foreign corporation and was not licensed to do business in this state. That is plainly ruled to the contrary by the numerous decisions to the effect that such section does not appertain to matters of interstate commerce.

U. S. Gypsum Co. v. Gleason, 135 Wis. 539, 116 N. W. 238; *Ady v. Barnett,* 142 Wis. 18, 124 N. W. 1061; *F. A. Patrick & Co. v. Deschamp,* 145 Wis. 224, 129 N. W. 1096; *Holder v. Aultman, Miller & Co.* 169 U. S. 81, 18 Sup. Ct. 269. As there held, a contract made in this state, but not to be complete so as to be binding on the foreign corporation party until approved at its home office outside this state, is not within the statute, and such a contract providing that such corporation shall furnish certain property, f. o. b. in this state, also for the filling of orders for goods by such corporation and subsequent taking of securities therefor, are matters of interstate commerce and so not within the statute.

It is suggested that this action and the one decided herewith on the second note should have been consolidated, under sec. 2610, Stats. 1915. The actions could not have been joined in the first instance, as they were brought by different parties and related, in some respects, to essentially different controversies. Therefore no error was committed in refusing the request for a consolidation.

Aside from the contentions above mentioned, the only matters complained of which seem to merit attention relate to whether the findings of fact are sustained by the evidence. The record has been carefully examined in respect thereto and the argument of counsel for appellants received due consideration, resulting in the conclusion that, under the rule governing the subject, the findings cannot be disturbed.

There seems to be ample evidence to support the view that the agents not only, to the knowledge of appellants, had no right to make such an agreement as that relating to the twenty horse-power tractor, or any contract except subject to the approval of respondent; but that such agreement was not made with respondent,—that it was a personal matter of Riplinger and Hocket which respondent never became a party to. In this particular, there seems to be ample evidence to support the findings. The agreement on its face, in connec-

tion with the evidence, bears quite clear indications that it was a side matter of the agents. It was wholly written by one of them, while respondent's contracts were made on printed blanks furnished for that purpose. It was signed by Riplinger and Hocket, personally, though after such signing, as it seems, Riplinger wrote respondent's corporate name above his and his associate's signatures. That is out of harmony with the body of the paper. The words "We agree" twice used, and the agreement in a specified contingency to take the machinery "off their floor and pay the wholesale price therefor or settle with the *Charles A. Stickney Co.* for notes . . . given them," etc., are inconsistent with the transaction being one to which respondent was a party.

It was conceded that if the agreement to sell the tractor was not a part of the contract with respondent, but was a personal affair of Riplinger and Hocket, the defense based on the contrary view utterly fails. We must sustain the theory that respondent was not such party; that no defense to the note can be found in the findings, and that they are supported by the evidence.

By the Court.—The judgment is affirmed.

MERCHANTS NATIONAL BANK, Respondent, vs. LYNCH and another, Appellants.

May 2—May 23, 1916.

Charles A. Stickney Co. v. Lynch, ante, p. 353, followed.

APPEAL from a judgment of the circuit court for St. Croix county: GEORGE THOMPSON, Circuit Judge. *Affirmed.*

Action to recover on a $318 promissory note alleged to have been made by defendants January 24, 1913, payable to the order of Charles A. Stickney Company, a Minnesota corporation, on or before January 24, 1915, and before maturity, for value, assigned to plaintiff. The complaint was in the usual form. The note was given under the same circumstances as the one sued on in the case of *Charles A. Stickney Co. v. Lynch, ante*, p. 353, 158 N. W. 85, and is the second note mentioned in the pleadings in such case. The defendants an-

swered, putting in issue the alleged ownership of the note and otherwise substantially, as in the *Stickney Case*, and, in addition, alleging that the Stickney Company, after defendants returned the property represented by said note, and upon their demand, agreed to return the particular note; but later refused to do so, that the note is without consideration and should be delivered up to be canceled; and demanded judgment dismissing the complaint with costs.

The court found the facts as in the *Stickney Case* and, in addition, that plaintiff became owner of the note for value before due, as alleged in the complaint. Judgment was rendered accordingly.

For the appellants there was a brief by *McNally & Doar*, and oral argument by *W. F. McNally* and *W. T. Doar*.

Spencer Haven, for the respondent.

MARSHALL, J. This case is ruled in respondent's favor by the result in the case of *Charles A. Stickney Co. v. Lynch, ante*, p. 353, 158 N. W. 85.

By the Court.—Judgment affirmed.

BISHOP, Plaintiff in error, vs. THE STATE, Defendant in error.

May 2—May 23, 1916.

Rape: Assault with intent: Evidence: Sufficiency.

Evidence *held* sufficient to sustain a conviction of assault with intent to rape.

ERROR to review a judgment of the circuit court for Washburn county: BYRON B. PARK, Judge. *Affirmed.*

The plaintiff in error (hereinafter called the defendant) was convicted in the Washburn county circuit court of an assault with intent to rape and was sentenced for a term of three years in the state prison.

The victim of the alleged assault was one Stella Bixby and the crime is alleged to have been committed on the 1st day of September, 1915. in the general store building of John Bixby, her husband, in the village of Trego. It appears from the

record that John Bixby left his wife in charge of the store on that day while he went out of the village to look at a cranberry marsh. Stella Bixby testified that about 8 o'clock in the evening she extinguished all but one light in the store and proceeded to lock it up for the night; that the defendant at this time came into the store; that she asked him if there was anything he wanted and he replied that he did not know as there was; that she took the keys out of the show case and came around to the outside of the counter and started for the outside door to lock it, when the defendant grabbed her and in the struggle backed her down the store to where there was a large flour bench on which flour was piled and tried to push her over onto the flour bench; that he made several attempts to get his hand under her clothes, while holding her tightly with the other hand and arm, and tore her dress in several places; that during the scuffle she grabbed an ax handle and made repeated attempts to strike defendant with it; that she succeeded in getting released from his grip and struck him, whereupon the defendant fled toward the front door; that she pursued him and struck him again as he was going through the door. John Bixby, her husband, had returned from the country in the meantime, and upon hearing a noise and the fall of dishes or pans in the store ran to the rear entrance, and as he stepped in the door he saw his wife strike some man with the ax handle as he was passing out of the front door. John Bixby testified that he could not swear that it was the defendant.

The defendant's defense was an *alibi*. Several witnesses testified to the effect that defendant remained at his pool room until after the Chicago train passed through Trego at 8:19 p. m. and that he then locked his pool room and walked home on the south side of the street at the same time that Mr. and Mrs. William Bishop were walking in the same direction on the north side of the street. The witnesses went to defendant's house and remained there until he went to bed at 10

o'clock. Vina Bishop and Lulu Sinclair, both daughters of the defendant, also testified that defendant came home a few minutes after the Chicago train had gone through Trego and remained at home until he retired at about 10 o'clock that night. The defendant did not take the stand in his own behalf.

Mr. and Mrs. Aitkin testified that they saw the defendant walking from the direction of the Bixby store at about the time Stella Bixby testified the offense was committed.

The jury found the defendant guilty of assault with intent to commit rape as charged in the information. The court sentenced the defendant to a three-year term in the state prison.

The cause was submitted for the plaintiff in error on the brief of *McNally & Doar,* and for the defendant in error on that of the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general.

SIEBECKER, J. It is contended that the evidence fails to show that the defendant assaulted the complaining witness with intent to violate her person forcibly and against her will. The evidence is ample to support the finding that defendant committed an assault upon Mrs. Bixby. The claim is made, however, that the facts and circumstances shown by the evidence do not permit of the inference that the assault was made with intent to commit rape. The features of the case characterizing the assault clearly disclose that defendant had the criminal intent of having carnal intercourse with the prosecutrix. The question is, Did he purpose to violate her person forcibly and against her will? The evidence tends to show that there was a most violent assault and that defendant persisted therein until he met most effectual resistance by his victim and was in peril of discovery by others. The record discloses surrounding conditions of the assault as testified to by the prosecutrix which justified the jury in finding that the

defendant desisted from his intent of violating the woman forcibly and against her will by the impending peril of bodily injury from her physical resistance and the fear of discovery by other persons coming to her rescue. It is a reasonable inference from the facts that the defendant became aware of Mr. Bixby's approach and that he realized from the resistance he met that he was in imminent peril of discovery, which caused him to flee. Under these conditions the offense is complete if the jury believed the assault was made with the intent to violate the woman forcibly and against her will. We are of the opinion that the evidence sustains the verdict and that the judgment of conviction is proper.

By the Court.—The judgment is affirmed.

STATE EX REL. ATTORNEY GENERAL, Respondent, vs. STOUGHTON CLUB OF STOUGHTON, WISCONSIN, and others, Appellants.

May 3—May 23, 1916.

Intoxicating liquors: Unlawful sale: Public nuisance: Abatement by equitable action: Conviction not a condition precedent: Constitutional law: Right to jury trial.

1. Under sec. 3180*a*, Stats. 1915, an equitable action may be maintained to enjoin or abate the public nuisance which, by sec. 1563, is declared to exist when any place is used for the sale of intoxicating liquors in violation of law.
2. Although under sec. 1563 a conviction of the keeper of such a place must be alleged and proved before the nuisance could be abated, there is no such condition precedent to an abatement under sec. 3180*a*; and the legislature had full power to provide the cumulative remedy given by the latter section.
3. Persons dealing in intoxicating liquors have no vested right to a jury trial upon the question whether or not their place of business is a public nuisance. For such purpose an equitable action constitutes due process of law.

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action to enjoin the defendants, the *Stoughton Club* and the members thereof, from maintaining their club premises and from vending, dealing in, or giving away intoxicating liquors contrary to the excise laws of the state. The complaint alleges that the defendants at their club rooms in the city of Stoughton have sold and are selling intoxicating liquors in violation of the laws of the state and that the *Stoughton Club* exists primarily for the purpose of evading the provisions of the laws of the state relating to the sale of intoxicating liquors. The defendants demurred to the complaint because it appears upon its face (1) that the court has no jurisdiction of the person of the defendants; (2) that plaintiff has not legal capacity to sue; and (3) that the complaint does not state facts sufficient to constitute a cause of action; and from an order overruling such demurrer they appealed.

For the appellants the cause was submitted on the brief of *J. C. Harper* and *Rufus B. Smith.*

For the respondent there was a brief by *Walter C. Owen,* attorney, and *Gilbert & Ela,* of counsel, and oral argument by *Emerson Ela.*

VINJE, J. The defendants' contentions as summarized in their brief are (1) that plaintiff's remedy is adequate at law and therefore the facts alleged in the complaint are not cognizable in a court of equity; (2) sec. 1563, Stats. 1915, provides for a penalty, and equity will not take jurisdiction to punish criminals in absence of special and very definite injury to property or property rights; (3) this action deprived the defendants of trial by jury to which they are entitled; and (4) if, under any view of the case, sec. 1563, Stats. 1915, can be construed to give jurisdiction to equity of the action at bar, it is on the sole condition that the complaint allege the conviction of the defendants. We deem it unnecessary to further state the argument or distinguish the cases referred to by the defendants because the question presented by the appeal is ruled by the provisions of our own statutes

passed since the cases cited were decided. Sec. 1563, Stats. 1915, provides:

"All places of whatever description in which intoxicating liquors are sold in violation of law shall be held and are declared public nuisances and shall, upon the conviction of the keeper thereof, be shut up and abated."

Sec. 3180*a*, Stats. 1915, also provides a remedy for abating public nuisances as follows:

"An action to enjoin a public nuisance may be commenced and prosecuted in the circuit court of the county in which the alleged nuisance exists, in the name of the state, either by the attorney general upon his own information, or upon the relation of a private individual having first obtained leave from said court to commence and prosecute the same."

This section was enacted in 1905, and prior to that time the abatement of places where intoxicating liquors were sold in violation of law was under sec. 1563, and confessedly a conviction of the keeper had to be alleged and proved before making a case under it. But sec. 3180*a* gives a cumulative remedy in equity which is invoked in this case. The power of the legislature to provide such cumulative equitable remedy cannot be successfully questioned. It was invoked and, *sub silentio,* sanctioned in *State ex rel. Marvin v. Larson,* 153 Wis. 488, 140 N. W. 285. The power of the legislature to deal with the liquor traffic by regulation or suppression is quite plenary and has time and again been justified as a valid exercise of the police power. In *Zodrow v. State,* 154 Wis. 551, 143 N. W. 693, in speaking of such power it was said:

"It may be summed up as resting upon the fundamental principle that society has an inherent right to protect itself; that the preservation of law and order is paramount to the rights of individuals or property in manufacturing or selling intoxicating liquors; that the sobriety, health, peace, comfort, and happiness of society demand reasonable regulation, if not entire prohibition, of the liquor traffic. Unrestricted, it leads to drunkenness, poverty, lawlessness, vice, and crime of

almost every description. Against this result society has the inherent right to protect itself—a right which antedates all constitutions and written laws—a right which springs out of the very foundations upon which the social organism rests; a right which needs no other justification for its existence or exercise than that it is reasonably necessary in order to promote the general welfare of the state."

Persons dealing in intoxicating liquors have no vested right in a jury trial in order to determine whether or not their place of business is a public nuisance. For such purpose an action in equity constitutes due process of law. Since the demurrer admitted the allegation of the complaint that defendants dealt in intoxicating liquors in violation of law in their club rooms, and since sec. 1563 declares every such place a public nuisance, the complaint stated a good cause of action and the demurrer was properly overruled.

By the Court.—Order affirmed.

FAUST LUMBER COMPANY, Appellant, vs. INDUSTRIAL COMMISSION OF WISCONSIN and another, Respondents.

May 3—May 23, 1916.

Appeal: Affirmance on equal division.

A judgment of the circuit court affirming an award made by the industrial commission is affirmed on appeal, this court being equally divided.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Application under Workmen's Compensation Act by *Lena Koltz* for compensation for the death of her husband caused by the kick of a horse. Claimant was awarded $2,100 compensation, payable in weekly instalments. The employer, the *Faust Lumber Company,* appealed to the circuit court for

Dane county, and upon a hearing had the order of the *Industrial Commission* was affirmed. The employer brings this appeal.

For the appellant there was a brief by *Quarles, Spence & Quarles,* attorneys, and *I. A. Fish,* of counsel, and oral argument by *Mr. Fish.*

For the respondent *Industrial Commission of Wisconsin* there was a brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Mr. Messerschmidt.*

George J. Bowler, for the respondent *Koltz.* [No brief on file.]

ROSENBERRY, J. Chief Justice WINSLOW and Justices SIEBECKER and VINJE are of the opinion that the judgment should be affirmed. Justices MARSHALL, KERWIN, and the writer are of the opinion that the judgment should be reversed and a new hearing before the *Industrial Commission* directed. This situation results in an affirmance of the judgment of the circuit court.

By the Court.—Judgment affirmed.

MALLON, Appellant, vs. TONN, Respondent.

May 3—May 23, 1916.

Libel and slander: Charging criminal offense: Illegal hunting of deer: Presumption as to place: Pleading: Amendment.

1. A letter charging that plaintiff hunted deer during the closed season and demanding that he go to the county seat of a county in this state and settle therefor or he will be prosecuted, was libelous *per se* because charging a criminal offense, the presumption being that the hunting was done in this state.
2. Allegations in a complaint that at a certain place in a county in which it was unlawful at any time to hunt deer defendant

falsely stated in the presence of other persons that plaintiff had hunted and shot at deer, and said to plaintiff's hunting companion that unless he went to the county seat and paid his fine he would be prosecuted, are *held*, when liberally construed upon a demurrer *ore tenus*, to state a cause of action for slander, the presumption being that the hunting was done in that county.

3. Where a proposed amendment to a pleading will tend to bring the real controversy between the parties fairly before the court, it should always be allowed, opportunity being given to the opposing party to meet it in case of surprise.

APPEAL from a judgment of the circuit court for Sauk county: JAMES O'NEILL, Judge. *Reversed.*

The complaint contains two counts, the first charging slander and the second libel. Upon the trial an objection to the reception of any evidence under the complaint was sustained, and the plaintiff appeals from a judgment of dismissal.

The first count alleges in substance that on December 12, 1914, at Leland, Sauk county, Wisconsin, the defendant in presence of many people who understood the German language said of the plaintiff in German (translating), "*Mallon* and his partner were deer-hunting and shot at deer," to which one Mielke who was present replied in German (translating), "That is a falsehood. I and Walter Alwin were with *Mallon*. We were hunting rabbits and not deer;" whereupon the defendant answered in German (translating), "You go to Baraboo and pay your fine or I will make complaint against you and send the game warden after you," meaning and being understood to charge the plaintiff with illegal deer-hunting.

The second count alleges that the defendant on December 9, 1914, wrote, published, and caused to be read by several people who understood German the following letter in the German language (translating): "Say *August Mallon*, I saw you yesterday (Tuesday) hunting deer and since I have already seen you several times doing the same thing I will give you the choice, you go to Baraboo and voluntarily settle within a week, or I will make complaint against you, this pertains

also to your partner. Show him this. Sunday ten o'clock you were also at it;" that plaintiff received said letter by mail on said date and that the same charged the plaintiff with the crime of illegal hunting and was so understood by those who read it.

For the appellant there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *Evan A. Evans.*

E. F. Dithmar, for the respondent.

WINSLOW, C. J. The objection should not have been sustained. It was a criminal offense to hunt deer in any part of the state at any time except during the last twenty days of November, and in the county of Sauk (among others) even this period was not excepted and there was no open season. Sec. 4562*d,* Stats. 1913.

It is clear that the second count sets forth a perfectly good cause of action. The libelous letter therein contained charges that the plaintiff hunted deer in December and demands that he go to Baraboo and settle or he will be prosecuted. It was unlawful to hunt deer at any place in the state at that time and the presumption would certainly be that the hunting was done in the state; but furthermore, the warning that settlement must be made at Baraboo (the county seat of Sauk county) makes it perfectly clear to any person that the charge was that the hunting was done in Sauk county. As this was a direct charge of the commission of a criminal offense it was *per se* libelous. No authorities are needed to substantiate this familiar principle.

As to the first count the question is not so clear, but we think a liberal construction of the complaint, which should always be indulged in in case of a demurrer *ore tenus,* leads to the same result. Here was also a threat that unless the plaintiff's hunting companion went to Baraboo and paid his fine he would be prosecuted, and the presumption that hunting was done in Sauk county necessarily follows. If there

were doubt about this, however, the court should have granted the motion of the plaintiff, which was at once made, for leave to amend the complaint by alleging that the words were intended by the plaintiff and understood by the hearers to charge that the hunting was done in Sauk county. Inasmuch as the answer admits the speaking of the words alleged and admits that defendant thereby intended to charge illegal deer-hunting in Sauk county, no surprise could be claimed at such an amendment. The time has gone by when amendments on the trial are to be viewed with suspicion and granted grudgingly. If it appears that the proposed amendment tends to bring the real controversy between the parties fairly before the court, the amendment should always be allowed, opportunity being given to the opposing party to meet it in case of surprise.

By the Court.—Judgment reversed, and action remanded for a new trial.

JOHNSON, Administrator, Appellant, vs. BANK OF WISCONSIN, Respondent.

May 3—May 23, 1916.

Trial by court: Receiving evidence under objection: Presumption on appeal: Witnesses: Competency: Transactions with persons since deceased: Bills and notes: Renewal: Collateral security: Assignment of interest therein: Rights of administrator of debtor.

1. Where the trial was by the court, improper evidence received under objection will be presumed not to have been given weight unless the contrary clearly appears.
2. Where plaintiff's counsel had offered to go into the whole of a transaction between the president of the defendant bank and plaintiff's intestate and had questioned such president in regard to some features thereof, the witness was competent thereafter, under sec. 4069, Stats., to testify on behalf of defendant to other features or details of the transaction not covered by his previous testimony.

3. Findings by the trial court that a renewal note given by plaintiff's intestate to the defendant bank was delivered unconditionally; that the collateral security for the old note was repledged for payment of the new note and all other indebtedness of the maker to the bank; and that the old note was not surrendered but was retained because the interest then due thereon was not paid or included in the renewal note, are *held* to be sustained by the evidence.

4. At the time of the death of plaintiff's intestate the defendant bank held several of his notes, with a large amount of collateral security. Interest amounting to $1,148.01 was due on such notes. Defendant loaned $7,500 to a land company organized to take over and handle certain property of doubtful value belonging to the estate, such company agreeing, as part consideration for the loan, to pay the $1,148.01 interest due to defendant. That arrangement was specially authorized by the county court as being advantageous to the estate. Defendant thereupon assigned its claim against the estate for said interest to the land company, agreeing that the collateral should "continue, as heretofore, proportionally and *pro rata*, security for the payment of said interest . . . until the same shall be fully paid" by the estate. Thereafter the land company transferred its rights under the last-mentioned agreement to the estate. *Held*, that such transfer operated to extinguish the indebtedness for interest and to remove the incumbrance which had been placed on the collateral for the benefit of the land company, and hence that plaintiff administrator did not thereby acquire a right to any of the proceeds of the collateral until the entire indebtedness of the estate to defendant should be fully paid.

APPEAL from a judgment of the circuit court for Dane county: JAMES WICKHAM, Judge. *Affirmed.*

The purpose of the action was to secure an accounting with defendant as regards the proceeds of some collateral claimed to have been pledged by decedent to the former to secure a particular promissory note, and to recover the surplus over what was necessary to satisfy such note. Defendant applied such surplus upon other indebtedness of decedent which it held, claiming that, subsequent to the collateral having been pledged to secure payment of the particular note, it was repledged to secure payment of all indebtedness of the decedent to it.

The purpose of the action was, further, to secure an accounting as regards the aforesaid proceeds and to recover a part of the surplus upon the theory that an interest in the collateral as security was assigned to plaintiff as administrator, incidental to an assignment to him of a part of the indebtedness for which the collateral was pledged. On this branch of the case, the claim of the defendant was that the alleged assignment was in fact a payment, freeing the collateral from any incumbrance thereon as against its interest therein. The issues raised by the pleadings and contested upon the evidence are indicated by the following summary of the findings made by the trial judge:

The note for $10,300, dated September 11, 1912, referred to in the complaint, was given by the decedent to defendant as a renewal of a note of the same amount, held by defendant, dated June 13, 1912, which is described in the pleadings. The renewal note was delivered unconditionally, but the old note was retained for the interest which had accrued thereon, that not having been paid or included in the new note.

The collateral security, mentioned in the pleadings, was sold by defendant and the proceeds applied to the indebtedness of decedent to defendant in all respects in accordance with the terms of the pledge of such securities and the order of the court in respect to the matter, leaving, at the time of the trial, a balance due defendant from the estate of decedent of $3,301.53 with interest thereon from January 30, 1914.

The claim, pleaded by plaintiff that he is entitled to the return of two certain land contracts, and a mortgage (forming part of the collateral security) or the proceeds of the same, is not supported by the evidence. At the time of the trial, no issue had been raised by the pleadings in respect to that matter and no claim was made that due credit had not been given in respect to such collateral. Subsequently, the pleadings having been amended, permission was granted plaintiff to support the allegation in respect to the particular matter by evidence, but none was offered.

By an instrument, executed and given by defendant to the Linden Hill Land Company, dated May 24, 1913, and an instrument executed and given by said company to plaintiff, in his representative capacity, dated May 31, 1913, the claim of $1,148.01, consisting of interest due defendant on notes of the decedent for which it held the collateral before mentioned in part as security, was extinguished as regards any right of plaintiff to any of the proceeds of the collateral, until the entire indebtedness of the estate of the deceased to defendant shall have been fully paid.

On such findings judgment was ordered in favor of defendant, dismissing the complaint with costs. Any further statement of facts necessary to an understanding of the case will be made in the opinion.

For the appellant there were briefs by *Gilbert & Ela* and *Paul D. Carpenter,* and oral argument by *Mr. Carpenter* and *Mr. Frank L. Gilbert.*

For the respondent there was a brief by *Olin, Butler, Stebbins & Stroud,* and oral argument by *John M. Olin* and *Ray M. Stroud.*

MARSHALL, J. Was the note of June 13, 1912, delivered to respondent, unconditionally, accompanied by a repledge of the collateral to the old note for the payment of the new one and all other indebtedness of the deceased to respondent? There was considerable other indebtedness, including interest on the old note. The transaction, in the main, was between Mr. Corry and Mr. Boyd, the respondent's president. The renewal note, so called, contained a recital that collateral had been deposited as security for its payment, followed by the words, "Collateral as per list attached, also on genl. a/c." Mr. Boyd was permitted, without objection, to testify that the added words meant that the pledge was to secure any indebtedness of the pledgor to the bank, and to testify, largely under objection, to the entire transaction between him on be-

half of the bank and Mr. Corry. The testimony, in the whole, tended quite strongly to support the claim of respondent that it was entitled to apply the proceeds of the collateral to the indebtedness on the particular note and any indebtedness it held against Mr. Corry at the time of his death. The court so found in the first and second findings, summarized in the statement. Such findings are challenged as contrary to the evidence.

The main ground upon which counsel for appellant challenge the findings, as above indicated, is that the testimony of Mr. Boyd, which was objected to, was incompetent and that without it, they are not supported by the evidence. True, if Mr. Boyd's evidence, so far as objected to, was incompetent under sec. 4069, Stats., and was vital to the findings, they cannot be sustained. It is not entirely clear that it was vital, or, if incompetent, the trial court gave controlling weight thereto in coming to the conclusions. Improper evidence taken in a court case under objection, is to be presumed not to have been given weight unless the contrary clearly appears. *Harrigan v. Gilchrist,* 121 Wis. 127, 312, 314, 99 N. W. 909. But, assuming that the evidence was vital and so considered, no error was committed because of appellant having so opened the door as to render it admissible. Appellant's counsel made the broadest kind of an offer to go into, with Mr. Boyd, the whole transaction, and his offer was accepted. They then interrogated the witness in regard to some communications and transactions between such witness and Mr. Corry. All the testimony which was objected to was directed to parts of the whole matter which counsel consented to have laid before the court. True, such testimony went to many details not referred to in that drawn out by counsel for appellant; but all related to the matter, in its entirety, and so was clearly competent.

Counsel seem to think that they opened the door by the offer and examination only as to the particular features of

the whole transaction which they interrogated the witness in respect to; but such is not the statute. When the door is once opened for one to testify to a communication or transaction had by him personally with a deceased person, the witness may testify, not only to the facts of such communication or transaction, first brought out, but to all "matters to which" the testimony in the opening "relates." Such is the plain meaning of the statute.

Treating, as it seems we must, all the testimony of Mr. Boyd as having been properly received and considered, the finding of unconditional delivery of the renewal note, repledging of the collateral, and sale and application of the proceeds thereof to the particular and other indebtedness, leaving a large balance due respondent, in all respects according to the terms of the pledge, is supported by the evidence. It does not seem to be required that we should state, in detail, what Mr. Boyd's evidence was. The effect of it, in connection with the other evidence, taken at its face value, seems to be conceded to form a pretty sound basis for the findings. There are some features of the case bearing on the credibility of Mr. Boyd's evidence, but nothing of a conclusive character, or that was not explained to the satisfaction of the court below with reasonable ground therefor.

The controversy in respect to such part of the proceeds of the collateral as the $1,148.01, mentioned in the last finding of fact, bears to the entire Corry indebtedness to respondent, as of the time such collateral was realized on, and the facts in respect thereto do not, perhaps, as clearly appear from the statement as is necessary to a full understanding of the matter. Such controversy is covered by the last finding of fact. That is said to be contrary to law and unsupported by the evidence.

At the time of the decease of Mr. Corry, he had some assets of doubtful value. The administrator seems to have regarded the same as not much better than mere possibilities

without use, in connection therewith, of a considerable sum of money, and administering the property otherwise than as an administrator could well do. In that situation, with approval of the court, a corporation was formed to take over and handle such property and procure the necessary money to efficiently do it. The name of the corporation was "Linden Hill Land Company." The success of the venture and the interests of the estate were largely dependent upon financial assistance by respondent. In due course, respondent, with the approval of the court, arranged to loan the estate agency, said Land Company, $7,500, said company, as part consideration, agreeing to pay the former the interest due it on Corry indebtedness, amounting to $1,148.01. The arrangement in respect to the matter was presented to the court, and specially authorized and directed to be carried out as advantageous to the estate. Pursuant to the order in respect to the matter, respondent, in writing, assigned its claim against the estate for interest to the Land Company, with the collateral held by the bank, in the proportion which the indebtedness assigned bore to the entire Corry indebtedness so held, "to continue, as heretofore, proportionally and *pro rata,* security for the payment of said interest . . . until the same shall be fully paid by the Corry estate." Shortly after the making of such assignment, the Land Company, in form, transferred its rights thereunder to the administrator of such estate. In the order of the court, the assignment to the Land Company was designated as "assignment and receipt for interest due *Bank of Wisconsin.*"

Considering all the circumstances in relation to the transaction, the trial court held that the purpose thereof was to have the corporation hold the indebtedness assigned as an outstanding claim against the Corry estate, and to have an interest in the collateral for its protection,—not that of the estate or its general creditors,—such interest to lapse upon the assigned indebtedness being paid or otherwise extinguished

by such estate; and that when the estate acquired such indebtedness, it must have acted in harmony with the spirit of the whole deal. In that view the finding was made that the assignment by the bank to the Land Company, and the satisfaction of the latter by the subsequent transfer of the indebtedness to the Corry estate, operated to extinguish it and remove the incumbrance placed on the collateral for the protection of the Land Company; that to hold otherwise and to permit the estate, which was not intended to be protected by the collateral, to be so protected, would be inequitable and sanction the use of the assignment for a purpose not intended and in such manner as to perpetrate a fraud, since the entire proceeds of the collateral come far short of covering the bank's indebtedness. That evidently is the logic underlying the court's finding. It is easily read out of the language used. The finding closes with the words, "Under the facts of this case, it would be inequitable to permit the plaintiff to enforce its claim against defendant or against any portion of the collateral security in the defendant's hands, until the defendant has been fully paid its claim against the deceased."

What the meaning, intent, and effect was of the two papers, is not entirely clear. There are many minor circumstances appearing in the evidence which tend to reinforce the major features referred to, in support of the trial court's view. The assignment by the bank to the Land Company, in view of all the facts, is somewhat ambiguous. The feature that the collateral should remain proportionally as security for payment of the assigned interest until such interest should be fully paid by the Corry estate, is repugnant to the idea that such estate could, instead of paying the claim, buy it and recoup out of the collateral. It seems the idea was that it could only acquire such claim, in harmony with the whole transaction, by paying it or doing something equivalent thereto as regards the collateral. When the bank loaned the $7,500 to the Land Company, with the understanding that its

interest claim should be paid, it could not have thought that it might be acquired by the Corry estate and held as a claim upon the collateral. On the whole, we incline to the view of the trial court, embodied in the finding, that the effect of what was done was to extinguish the indebtedness which was assigned to the Land Company. That is in harmony with what the county court, the administrator of the estate, and the officers of the bank evidently supposed would be done when the loan of $7,500 was arranged for.

The foregoing, it seems, covers all features of the case which merit attention.

By the Court.—The judgment is affirmed.

SIEBECKER, J., took no part.

GREENEY and others, Appellants, vs. GREENEY and others, Respondents.

May 3—May 23, 1916.

Appeal: From what may be taken: Findings and conclusions: Partition.

1. Mere findings of fact or conclusions of law cannot be appealed from.
2. Findings of fact and conclusions of law in a partition action do not constitute, in substance or effect, an order or interlocutory judgment from which an appeal can be taken under sec. 3143, Stats.

APPEAL from the circuit court for Sauk county: JAMES O'NEILL, Judge. *Dismissed.*

A. J. Gemmill, for the appellants.

For the respondent *Anna Edmond Greeney* there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *Evan A. Evans.*

For the respondents *F. R. Bentley, Bentley, Kelley & Hill,* and *W. C. Miller* there was a brief by *Bentley, Kelley & Hill,* and oral argument by *Frank R. Bentley.*

SIEBECKER, J. This is a partition action. The action was brought to trial at the September, 1915, term of the Sauk county circuit court. The court heard all of the evidence of the parties and made and filed its findings of fact and conclusions of law. The court found that the parties were entitled to an order directing the sale of the premises and to a division of the net proceeds of such sale among the persons specified in such findings. These findings bear date October 30, 1915, and were filed by the clerk of the circuit court November 1, 1915. On November 3, 1915, the court signed an order appointing A. H. Clark referee to sell the premises at public auction. On November 11, 1915, a written notice was served by plaintiffs on defendants' attorneys stating that plaintiffs appeal to this court "from a part of the order, entitled findings of fact and conclusions of law, declaring the rights, titles, and interests of the several parties to this action in and to the real estate described in the complaint, and directing sale and disposition of the proceeds of sale of same, . . . dated October 30, 1915." This written notice also specified the parts of the findings the appeal is intended to embrace. A second written notice of like tenor and effect, with some modifications of the former one, was served by and on the same parties on November 29, 1915. No interlocutory judgment or order was made and entered by the court determining or adjudicating the rights, title, or interests of the parties to the action in and to the premises involved in the action. It is admitted that the attempted appeal is not intended as and is not in fact an appeal from the order appointing a referee to sell the premises. It is conceded that the proceedings of this appeal were intended to include for review only the findings of fact and conclusions of law made by the court on October 30, 1915,

as specified in such notices. The argument is made that these findings and conclusions constitute in effect an order or interlocutory judgment and that an appeal can be predicated thereon. It is provided by sec. 3143, Stats., that persons interested in the premises or any parties to this kind of an action may "appeal from any judgment or order of the court . . . within the same time and under the like regulations as in other cases." It has been decided in *Webster-Glover L. & M. Co. v. St. Croix Co.* 63 Wis. 647, 24 N. W. 417, that "The attempt to appeal from the mere findings or conclusions of law of the trial court was nugatory. . . . An appeal to this court by a party aggrieved must be from a judgment or such an order as is defined in sec. 3069, R. S., as being appealable." The following are additional adjudications to the same effect: *Bourgeois v. Schrage,* 69 Wis. 316, 34 N. W. 96; *Smith v. Shawano Co.* 77 Wis. 672, 47 N. W. 95; *Baker v. Bohnert,* 158 Wis. 337, 148 N. W. 1093.

The claim that the findings of fact and conclusions of law are in substance an order or judgment in the action is wholly untenable. Such findings are a statement of the ultimate facts established by the evidence and the court's opinion regarding the rules of law applicable to such facts. They do not constitute an adjudication which determines the legal rights of the parties to the action in the subject matter involved in the controversy. The provisions of ch. 134, Stats., governing "Actions and proceedings for partition," contemplate that the court shall make its determination as to the legal rights of the parties by order or judgment as in proceedings in other actions. The statutes authorize the court to make and enter orders in the nature of interlocutory determination for the determination of the questions as they arise throughout the course of the proceeding. No order or judgment has been made by the court determining the rights and interests of the parties to this action in and to the premises here involved and hence there is no judicial determination of

the trial court of the question sought to be reviewed in this court. When such determination is in fact made by the trial court, then the aggrieved parties may invoke their right of appeal conferred by sec. 3143, Stats. It follows that the attempted appeal is nugatory and must be dismissed.

By the Court.—It is so ordered.

BROADBENT, Appellant, vs. HUTTER, Respondent.

May 3—May 23, 1916.

Mortgages: Deed absolute in form: Assumption of mortgages: Mistake: Reformation: Laches.

A warranty deed containing a clause by which the grantee assumed two mortgages on the premises was given to such grantee merely as security on his previous indorsement of a note of the grantor. Said assumption clause was inserted by accident and mistake and there was no consideration therefor. The grantee had not asked for security or a deed, and did not examine the deed or learn its contents until some two years later. In an action against such grantee to enforce liability for the mortgage debts, it appearing that his receiving and holding the deed and failure to discover the assumption clause had not in any way damaged the plaintiff, it is *held* that defendant was entitled to have the deed reformed by striking out such clause and to have it adjudged to be a mortgage executed as security only. *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, and *Van Beck v. Milbrath*, 118 Wis. 42, distinguished.

APPEAL from a judgment of the circuit court for Sauk county: JAMES O'NEILL, Judge. *Affirmed.*

The plaintiff sold real estate situate in Grant county, Wisconsin, to E. H. Hutter, brother of defendant, *William H. Hutter.* E. H. Hutter, in payment of part of the purchase price, made, executed, and delivered to the plaintiff a note for $1,280 and a mortgage upon the real estate sold to him by plaintiff to secure said note. At the time E. H. Hutter ex-

ecuted this note and mortgage there was outstanding a $2,500 note and mortgage which was given by plaintiff while he owned the property. Subsequent to the execution of the mortgage by E. H. Hutter to the plaintiff said E. H. Hutter transferred the real estate to his brother, *William H. Hutter,* defendant herein. After the conveyance by E. H. Hutter to defendant the holder of the first mortgage for $2,500 foreclosed; the property was sold and a deficiency judgment rendered in favor of the mortgagee against the plaintiff for $1,026 and interest.

The present action was brought to enforce liability against the defendant for the note of $1,280 and interest secured by mortgage, which the plaintiff claims the defendant assumed under the deed from E. H. Hutter to defendant, and also to enforce liability against the defendant for $1,026 and interest, deficiency judgment, above referred to.

The defense made by defendant was that the deed from E. H. Hutter was in fact a mortgage, and that there was no consideration for the agreement on the part of the defendant to assume the outstanding notes and mortgages.

At the close of the evidence a motion was made to amend the answer so as to set up the facts necessary to show a right to reform the deed from E. H. Hutter to defendant so as to eliminate the clause therein providing for the assumption of the previous incumbrances so as to conform to the proofs in the case. The court below found that E. H. Hutter on and prior to November 10, 1910, was the owner of the real estate in question; that said E. H. Hutter made and delivered to the plaintiff the note and mortgage referred to in the complaint; that on March 4, 1911, said E. H. Hutter and wife executed an instrument in form a warranty deed purporting to convey said real estate to defendant, which deed contained the following clause: "As a part of the above consideration the grantee assumes and agrees to pay a certain mortgage on said described premises in favor of A. J. Garner dated April 4,

1908, for $2,500. Also a mortgage for $1,280 to *Fred Broadbent* dated November 10, 1910;" that the mortgage in favor of said Garner was foreclosed and a deficiency judgment of $1,026 rendered on said foreclosure; that the defendant at the request of E. H. Hutter has conveyed his interest in said premises; that plaintiff has never been paid any part of said $1,280 mortgage, except interest for one year, and there is due him thereon $1,280 and interest; that said writing, in form a deed, executed by said E. H. Hutter and wife to defendant was intended by the grantors to be security to secure the defendant for indorsing a note of $200 for E. H. Hutter; that said deed was in fact a mortgage, and defendant was not a purchaser of said real estate and received and held said deed only as security; that E. H. Hutter is insolvent and has neglected to pay said note; that defendant did not request his brother to execute said deed or give him any security for said indorsement, but E. H. Hutter executed such deed, had it recorded, and sent it to defendant in an envelope; that the defendant, not being interested in his brother's affairs, kept the deed in an envelope without opening the same or examining the contents of the deed; that later defendant conveyed said premises to a party who purchased the same from E. H. Hutter; that defendant had no knowledge of the assumption clause in said deed until an action was commenced to foreclose the Garner mortgage and the complaint served upon him; that defendant never entered into any contract with his brother to assume or pay said mortgages nor was there any consideration for any such contract or agreement; that the clause in said deed was inserted by accident and mistake and without any intention on the part of defendant to accept said deed as security with any such agreement to assume the payment of said mortgages; that as said deed was executed as security only, defendant had no reason to suspect that any such clause making him liable to pay mortgages would be written therein, and the court found defend-

ant under the circumstances was not negligent in failing to read said deed to see what its contents were; that plaintiff has not been damaged by the conduct of defendant in receiving and holding said deed, or by any negligence of defendant in not discovering said clause in said deed; that plaintiff has not paid the deficiency judgment rendered against him in the Garner foreclosure; that it would be grossly unjust, inequitable, and a great hardship to require defendant to pay the mortgages referred to, on the ground that said clause was written in said deed by accident and mistake.

The court concluded that said deed should be adjudged to be in fact a mortgage executed as security only; that said deed should be reformed and said clause providing for assumption of said mortgages be stricken therefrom, on the ground that the same was inserted by accident and mistake; and that the complaint be dismissed with costs.

Judgment was entered accordingly, from which this appeal was taken.

For the appellant there was a brief by *P. C. Pitkin,* attorney, and *Grotophorst, Evans & Thomas,* of counsel, and oral argument by *Mr. Evan A. Evans* and *Mr. Pitkin.*

Thos. W. King, for the respondent.

KERWIN, J. It is without dispute that the deed to defendant was executed and delivered by E. H. Hutter for the purpose of securing defendant on his indorsement of a note of E. H. Hutter for $200. It is also established that defendant did not require security, never asked that the deed be given, and in fact knew nothing of the terms of it when it was delivered to him. The deed was not delivered to defendant when he indorsed the note for E. H. Hutter, nor mentioned, but sometime afterwards E. H. Hutter caused the deed to be executed and recorded and delivered it to the defendant, *William H. Hutter,* saying that he desired to secure him on the indorsement. The deed when delivered to defendant was

inclosed in an envelope and put away by him and never read or examined until the papers in the foreclosure suit were served upon him.

The findings of fact are well supported by the evidence and support the judgment.

1. It is first insisted by counsel for appellant that defendant promised to pay the indebtedness covered by the two mortgages on the property and is absolutely liable on such promise. But it is established without dispute that the deed to defendant was given as security and that the provision assuming the mortgage indebtedness was inserted in the deed to defendant by accident and mistake.

2. It is further contended by appellant that the defendant was bound to know the contents of the deed delivered to him, and that he could not lay it aside for two years without examination and then ask to be relieved from the terms thereof, and relies upon the doctrine of *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, 89 N. W. 538, 92 N. W. 246, and *Van Beck v. Milbrath,* 118 Wis. 42, 94 N. W. 657.

But the case here is clearly distinguishable from the cases relied upon by appellant. Here there was nothing whatever to put the respondent on inquiry. The deed was made and recorded by his brother, E. H. Hutter, and delivered to defendant as security without any intention on the part of the grantor or defendant that it was given for any other purpose. In the *Bostwick* and *Van Beck* cases the controversy was between the parties to the contract. Here there is no controversy between the parties. It is admitted by both parties to the deed that the assumption clause has no place in it.

The deed having been given merely as security, there was no consideration for the alleged assumption of liability contained therein, and evidence was competent to show that the deed was given merely as security. *Smith v. Pfluger,* 126 Wis. 253, 105 N. W. 476; *Corbett v. Joannes,* 125 Wis. 370, 388, 104 N. W. 69.

It was found by the court below upon sufficient evidence that the plaintiff was not damaged by the conduct of the defendant in receiving and holding the deed or in not discovering the assumption clause until suit was commenced.

The motion to amend the answer at the close of the evidence by setting up a claim for reformation of the deed was proper and the evidence ample to support the findings to the effect that defendant was entitled to reformation. We think the case was correctly decided below, therefore the judgment must be affirmed.

By the Court.—Judgment affirmed.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant, vs. SHEPARD DRAINAGE DISTRICT, Respondent.

May 4—May 23, 1916.

Drains: Crossing railway right of way: Opening bridges: Recovery of expense: Pleading: Demurrer: Counterclaim: Appeal: Questions before court.

1. A railway company which, in compliance with sec. 1379—29, Stats., opened bridges on its right of way to permit the passage through them of a drainage ditch and the dredges constructing it, may maintain an action against the drainage district for the expense incurred in so opening its right of way. *Chicago, M. & St. P. R. Co. v. Lemonweir River D. Dist.* 135 Wis. 228, distinguished.
2. The complaint in such an action is not defective because it fails to show that the amount claimed was included in the cost of construction, or that, if so included, the assessment for benefits would be still equal to or greater than the assessment for cost of construction.
3. Upon appeal from an order sustaining a demurrer to a counterclaim as a demurrer to the complaint, but making no reference to the counterclaim, the question whether the counterclaim was properly pleadable as such is not before the appellate court.

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

Action under sec. 1379—29, Stats., to compel payment of the amount of expense incurred in opening plaintiff's right of way for passage of dredge.

Omitting formal allegations, the material part of plaintiff's complaint is as follows: That during the months of December, 1911, and January, 1912, the defendant was engaged in the construction of a drainage ditch within said district in accordance with certain plans and specifications theretofore approved by this court, and that in carrying on this project it became necessary to carry said drainage ditch and the dredge or dredges used in building the same through plaintiff's bridges C–584 and C–586; that in accordance with the statute in such case made and provided, particularly sec. 1379—29, the defendant, the *Shepard Drainage District,* on or about the 28th day of November, 1911, notified the plaintiff, both orally and in writing, to open its right of way and permit the defendant and its agents, servants, and employees engaged in the construction of said ditch to pass said ditch and the dredge or dredges used in constructing the same across the plaintiff's right of way and through the aforesaid bridges; that pursuant to said notice and in accordance with the statute in such case made and provided, plaintiff, during the months of December, 1911, and January, 1912, then and there performed work and labor, furnished material, and opened said bridges for the defendant; that the reasonable value of said work and labor performed and material furnished in opening said bridges is $3,421.34, and that by reason of the performance of the work and labor and the furnishing of the material by the plaintiff to the defendant at its request the defendant is indebted to plaintiff in the sum of $3,421.34.

The defendant answered, alleging that the stream in question was a natural watercourse, that the railroad company,

without any right or license, placed within the limits of the stream the bridges in question, thereby wrongfully obstructing the stream and causing sand-bars to be formed; that prior thereto the stream was navigable for rowboats and launches; that the same has always been used as a public waterway for the passage of small boats and hunting craft; that defendant gave the notice required by law to be given to the railroad company in case its bridges were to be moved to permit the passage of a dredge; that it was using said stream as a natural highway and that it had a right to do so; that the obstruction made by the bridge was wrongful, and that it was the duty of the railroad company to remove the same and leave the highway unobstructed for the passage of the dredge; that after the canal had been constructed by the defendant the plaintiff company placed logs and timbers therein, wrongfully obstructing the same. The answer further alleged that plaintiff was a party defendant to the drainage proceedings by which the said drainage district was established; that plaintiff herein appeared in the drainage proceedings and stipulated that the plans and specifications adopted by said district did in fact benefit the bridges of the plaintiff railroad company, and that the plaintiff is now estopped from asking or claiming any damages on account of the reconstruction of said bridge. The facts set out in the answer are pleaded both by way of answer and as a counterclaim. Defendant asked that plaintiff be required to remove the obstructions placed in the canal by it subsequent to the construction of the canal and that plaintiff's complaint be dismissed.

Plaintiff demurred to the counterclaim. Upon the hearing, the demurrer to the counterclaim relating back to the complaint, the trial court held the complaint insufficient in that it did not state facts sufficient to constitute a cause of action, and defendant had an order accordingly, from which order plaintiff brings this appeal.

For the appellant there was a brief by *Sanborn & Blake,* and oral argument by *John B. Sanborn.*

For the respondent there was a brief by *Hall & Baker,* and oral argument by *F. W. Hall.*

ROSENBERRY, J. There are two questions argued: (1) Does the complaint state a cause of action? (2) Are the facts set out in defendant's answer pleadable as a counterclaim?

1. Whether the complaint states a cause of action or not depends upon whether it is an action to recover "damages" under sec. 1379—18, Stats., or whether it is for compensation under sec. 1379—29. The case of *Chicago, M. & St. P. R. Co. v. Lemonweir River D. Dist.* 135 Wis. 228, 115 N. W. 825, is said to determine this question adversely to plaintiff herein. In that case certain damages were awarded to the railroad company on account of injuries to its right of way. On motion of the railroad company the report was modified by the court, so that instead of determining the damages to the railroad company's right of way the determination thereof was postponed to a future date and an attempt was made to bind the drainage district for the expenses of structural changes in the railroad bridges and culverts then or thereafter made necessary by the construction of the drainage system. This court held:

"This stipulation and this portion of the report and order of confirmation were unauthorized by statute, contrary to the spirit and intent of the drainage law, and of no legal force whether embodied in the final order or not. . . . If it could be held that this provision of the order had any force or legal validity, any owner of land to be affected by the improvement in the drainage district could so procure the postponement of the ascertainment of his damages until after the improvement was completed and thus defeat the whole scheme of the drainage act and the express provisions of the statute. All damages allowed to the owners of property shall be paid or tendered before the commissioners shall be authorized to enter upon the lands for the construction of any work proposed thereon." 135 Wis. 236.

It will be noted that in the above case the compensation was for permanent changes in the right of way of the railway company which were absolutely necessary and without which the drainage scheme could not be completed. In the instant case the defendant might or might not, as it saw fit, require the plaintiff company to open its bridges for the passage of its dredge. It produced no change in the right of way and roadbed of the plaintiff company necessary to the maintenance and construction of the canal. In view of the expense the defendant might have decided to construct its canal through the right of way or roadbed of the defendant in some other way. We think the present action is one for work and labor performed and materials furnished in the course of the construction of the canal and in compliance with the provisions of sec. 1379—29, Stats., and not for damages caused by the proposed drainage scheme, and that the complaint therefore states a cause of action.

Defendant contends that the complaint is defective in that it fails to show that the amount claimed was included in the cost of construction, or that, if so included, the assessment for benefits would be still equal to or greater than the assessment for cost of construction. We do not consider this point well taken. Whether or not the defendant can be compelled to pay the judgment, should one be rendered, is a matter which cannot be determined at this time.

2. Are the facts set out in defendant's answer pleadable as a counterclaim? The order appealed from sustains the demurrer as a demurrer to plaintiff's complaint and makes no reference to the demurrer to the counterclaim. Therefore the second proposition is not before us and cannot be decided here.

By the Court.—The order appealed from is reversed, and the cause remanded for further proceedings according to law.

STATE EX REL. TATE, Appellant, vs. WOLF, City Clerk, Respondent.

May 4—May 23, 1916.

Intoxicating liquors: Licenses: Premises near school: Remonstrance: Right of remonstrant to withdraw name: Fraud.

1. A person who signs a remonstrance under sub. 5, sec. 1548, Stats., has no right to withdraw his name therefrom after the remonstrance shall have taken effect by being filed as the statute provides. *La Londe v. Barron Co.* 80 Wis. 380, distinguished.
2. It may be, however, that signatures to such a remonstrance which were procured by fraud should not be counted.

APPEAL from a judgment of the municipal court of Outagamie county: ALBERT M. SPENCER, Judge. *Reversed.*

Application was made to the common council of the city of Kaukauna, by one Otto Luedke, for a license to conduct a saloon for the sale of intoxicating liquors for the license year, commencing in June, 1915. A remonstrance against granting the application was duly filed January 21, 1915, under sub. 5, sec. 1548, Stats., and was sufficiently signed. Such section provides as follows:

"Whenever after January 1, 1908, a list of all the parents and lawful guardians of the children enrolled as pupils of any public school . . . with a remonstrance in writing, signed and acknowledged before a notary public by a majority of such" persons, "is filed with the city . . . clerk, . . . describing certain premises for which a license had previously been issued within three hundred feet of the grounds of said . . . school, . . . and demanding that no license be granted for the sale of intoxicating liquors on such premises, no such license shall thereafter be granted to any person for the sale of such liquors on such premises."

On such day, after such filing, eight signers of the paper filed with the city clerk a request to have their names erased therefrom, because they signed the same without knowing the facts. Later, on the same day, the council duly met, referred the application, remonstrance, and request, to a committee

and adjourned to June 25th thereafter. On that day the eight signers duly filed a second request of the tenor of the first, claiming that they signed the remonstrance in ignorance of its contents and purpose and were induced thereto by false representations and insistence of the circulators. The latter filed affidavits to the effect that they fully informed such signers of the purpose and contents of the remonstrance before they signed the same. The council then took up the matter for consideration. An offer to show that the requests for withdrawals were unfairly obtained was rejected and, in due course, without formally allowing the names to be withdrawn from the remonstrance, they were treated as withdrawn, leaving an insufficient number to satisfy the statute, and a resolution was adopted allowing the application for a license.

After the occurrences aforesaid a *certiorari* action was duly commenced to test the validity of the council's determination. Issue was duly joined, by a motion to quash, as to the sufficiency of the facts set forth to show want of jurisdiction of the council to grant the application for a saloon license. The vital point was whether a person who signed the remonstrance had a right, after the same was duly filed with the clerk, to withdraw therefrom, either with or without permission of the council, before such council acted thereon. The decision was in the affirmative and judgment was rendered accordingly, dismissing the action. The relator appealed.

For the appellant there were briefs by *Somers & Velte,* and oral argument by *Charles H. Velte.*

For the respondent there was a brief by *Geo. H. Kelly,* and on behalf of Otto Luedke a brief was also filed by *Rooney & Grogan;* and the cause was argued orally by *Francis J. Rooney.*

MARSHALL, J. The question raised on this appeal is whether a person who signs a remonstrance under sub. 5, sec. 1548, Stats., has a right to withdraw his name after the re-

monstrance shall have taken effect by being filed as the statute provides.

The common council, in the particular instance, acted upon the assumption that a remonstrant has the absolute right of withdrawal at any time before action upon an application for a license to keep a saloon for the sale of intoxicating liquors within the territory involved. It evidently did not act upon the theory that the persons who asked to have their names erased from the remonstrance had been induced thereto by fraud. It could not well have so acted upon the mere general claim of such persons,—no showing having been made of what was said or done to deceive them,—in face of the positive statements, under oath, by those who circulated the remonstrance, that they carefully explained it to each signer; but the form of the resolution which was adopted leaves no room for fair doubt but what the supposition was that the absolute right of withdrawal existed. Such resolution contained this language in respect to the effect of the remonstrance:

"Believing that the question is one that should be ruled upon by a court of higher authority so that all parties may be fully and legally satisfied, and in order to make it possible to secure such court decision, be it resolved that the remonstrance presented does not contain a sufficient number of names after withdrawing those who have requested the removal of their names, and in order to make it possible to have the matter tested in court we decide that the license may be granted and that it is hereby granted."

The trial court, evidently, affirmed the action of the council, solely upon the ground that a remonstrant had an absolute right to change his mind and withdraw his opposition to the granting of a license. We gather that from the opinion wherein particular stress is put upon *La Londe v. Barron Co.* 80 Wis. 380, 385, 49 N. W. 960, which dealt with the subject of whether, under the statute on the subject, petitioners to have submitted to the qualified voters of a county the ques-

tion of changing the location of the county seat may withdraw their names from the petition before final action by the board of supervisors thereon. A petition signed by two fifths of the legal voters of the county, to be determined in a particular way, is requisite to give the county board jurisdiction to submit such a matter to the voters of the county. That is quite distinguishable from the case in hand. Here the filing of a remonstrance, satisfying the requirements of the statute, takes from the governing board all jurisdiction to grant a license for the sale of intoxicating liquors in the territory involved. Such board is not required to act upon the matter, as under the statute regulating the manner of changing a county seat. It is not required to do, but is prohibited from doing, anything if the requisite names appear upon the remonstrance. Whether such is the fact, the board must necessarily determine.

Where a county board obtains jurisdiction, as under the statute dealt with in the *La Londe Case,* the right of withdrawal from the request for action has been, elsewhere, quite often held to exist up to the time of action being taken. *Littell v. Vermilion Co.* 198 Ill. 205, 65 N. E. 78; *State ex rel. Andrews v. Boyden,* 21 S. Dak. 6, 108 N. W. 897; *Green v. Smith,* 111 Iowa, 183, 82 N. W. 448; *Black v. Campbell,* 112 Ind. 122, 13 N. E. 409. Many similar cases might be cited. Where statutes do not require the governing board to take action upon the petition or remonstrance, it has been held that the right of withdrawal after filing of such petition or remonstrance does not exist. *State ex rel. Ketterling v. Gregory,* 26 S. Dak. 13, 127 N. W. 733; *State v. Gerhardt,* 145 Ind. 439, 44 N. E. 469; *McCullough v. Blackwell,* 51 Ark. 159, 164, 10 S. W. 259.

It is useless to try to harmonize the numerous decisions cited to our attention. If there be any line dividing the same into two classes, it is the one indicated. However, in the last analysis, we must turn to the statute itself and deter-

mine therefrom what the legislative purpose was and give effect thereto. Such statute, in some respects, is unlike any dealt with in the decisions referred to, or elsewhere, so far as we can discover. Neither foreign statutes nor decisions are very helpful, if at all, in this case. Therefore we will not spend time by referring to them further.

Our statute was evidently designed to afford an easy method of enabling patrons of a school to vote on the question of prohibiting the sale of intoxicating liquor within 300 feet of the school grounds. That being the case, the signing of the remonstrance, upon filing thereof with the clerk, must be regarded the same as casting a vote at an election in the ordinary way. That is the logic of *McCullough v. Blackwell, supra.* If the election was conducted in such ordinary way, no one would claim that a voter, after having deposited his ballot in the ballot box, could withdraw it. The wording of the statute is very significant. Its meaning seems to be unmistakable. "Whenever" the required remonstrance "is filed with" the proper clerk "demanding that no license be granted for the sale of intoxicating liquors" on the particular premises mentioned "no such license shall thereafter be granted to any person for the sale of such liquors on such premises." We do not see how that plain legislative mandate can be varied by construction or by what courts in other states have said in dealing with other statutes. The unmistakable purpose of the legislature was to put it in the power of the patrons of a school to make the immediate vicinity of the school grounds, to the extent indicated in the statute, prohibition territory. It is significant that the statute did not leave any opportunity to change the condition in that regard, after its being once created, except by some subsequent legislative action. The effect of filing the remonstrance, in connection with the statute, is the same as a legislative command that no license shall be granted for the sale of intoxicating liquors within the territory involved.

Any other holding than as above indicated would be liable to result in an unseemly contest upon any occasion of the filing of a remonstrance under the statute. There would be a canvass to secure withdrawals after the filing of the remonstrance and for withdrawal of withdrawals, with consequent hearings before the council in respect to the matter. Certainly the legislature did not intend to create any such situation, when it used the plain language to the effect that "whenever" the prescribed remonstrance and demand is filed, the territory involved shall henceforth be prohibition territory as regards the sale of intoxicating liquors. The purpose was to enable the requisite number of remonstrants, by expressing their wishes in the manner indicated, to make the question involved an absolutely closed matter.

It may be that, in case of names being secured to a remonstrance filed under the statute by such fraudulent means that they ought not to be regarded as being there, they should not be counted; but the record here does not present any such situation. It does not appear, by anything claimed to have been said by the circulators of the remonstrance, that the signers were prevented from reading the paper. If they knew its contents, or the purport of it, or were negligent in not knowing such, they are chargeable with such knowledge and with its purpose. Certainly as before indicated, mere general statements by signers, as in this case, should not be held to convict the circulators of having committed a most reprehensible fraud upon their neighbors, in the face of sworn testimony that such circulators explained to each signer of the remonstrance its purport and purpose.

We must hold that the court below committed error in affirming the action of the common council.

By the Court.—The judgment appealed from is reversed, and the cause remanded with directions to the court below to reverse the action of the common council.

SCHUMANN, Respondent, vs. CITY OF KAUKAUNA, Appellant.

May 4—May 23, 1916.

Instructions to jury: Harmless errors: Highways and bridges: Injuries from defects.

1. **Error in refusing to give requested instructions which were appropriate and would have aided the jury will not work a reversal unless it appears that had they been given the result would probably have been more favorable to the party requesting them.**
2. **Thus, in an action for personal injuries caused by one of plaintiff's horses getting caught in the crack or opening between a drawbridge and the approach thereto, the question being whether such crack, under the existing conditions as to slope and unevenness of the floor surfaces, rendered the bridge defective and dangerous to persons driving over it, the refusal of requested instructions is *held* not to have been a prejudicial error, although the charge given was quite general.**

APPEAL from a judgment of the municipal court of Outagamie county: ALBERT M. SPENCER, Judge. *Affirmed.*

The action is brought by the plaintiff to recover damages for personal injuries sustained as a result of an accident which occurred while driving a team of horses across a bridge in the city of *Kaukauna.*

The plaintiff was driving a two-horse team at a walk, with a heavy wagon loaded with sand upon which he was sitting, across the bridge here in question. The bridge is over 600 feet in length and slopes downward to the south at about a five per cent. grade, the direction the plaintiff was driving. There is a draw about 170 feet long near the north end of the bridge for the passage of boats navigating the Fox river. The draw also slopes toward the south. At the connection of the draw with the approach from the south there was a crack or opening of about two inches, and there was a difference between the level of the draw and the approach of about one and three quarters inches. The plaintiff testified that on September 8, 1914, he was driving very slowly over this bridge;

that he had a tight hold of each rein, one in each hand, because of the slope of the bridge; that when the team reached the end of the draw where it connects with the south approach, the left-hand horse got caught in the crack and stumbled in a falling manner; that the sudden jerk on the reins pulled him from his seat on the wagon, threw him under the wheels, and caused two breaks in his left arm and other bad bruises. Several teamsters testified to the effect that their horses were caught in this crack in a like manner and that they had notified the mayor and street commissioner of the city of *Kaukauna* of the condition of the bridge. The case was tried to a jury, who rendered a general verdict in plaintiff's favor and assessed the damages.

The court instructed the jury, "The law imposes upon every municipal corporation the duty of keeping its streets and bridges in a reasonably safe condition for public travel over them," and "It is for you to determine from the evidence and all the circumstances whether there was a defect in the Lawe street bridge, at the time and place of the accident, which was dangerous to those who had occasion to use the bridge." The court refused to give the following instruction asked for by the defendant: "The court instructs you that the fact that the defendant might have covered this crack with an apron is not established by the evidence in the case; there is no evidence as to the conditions where such other bridges and cracks had such protection, and you are not permitted to find the defendant to have been guilty of actionable negligence by reason of the absence of such a covering over the crack in question," and "the court further instructs you that if you find that there was no more of an opening or crack at the place of the accident than was necessary for the operation of the drawbridge, then you will acquit the defendant of negligence in that regard."

A judgment was entered for the recovery of the amount of damages found by the jury, together with the costs of the action. From such judgment this appeal is taken.

For the appellant there was a brief by *George H. Kelly*, attorney, and *Greene, Fairchild, North, Parker & McGillan*, of counsel, and oral argument by *J. H. McGillan*.

For the respondent there was a brief by *Albert H. Krugmeier* and *Fred V. Heinemann*, and oral argument by *Mr. Krugmeier*.

SIEBECKER, J. It is contended that the court erred in refusing to give the requested instructions set out in the foregoing statement. The argument is that the instructions given on the question included in the requested instructions are so indefinite and uncertain that the court failed to inform the jury that if the crack or opening complained of was no more than was necessary for operating the drawbridge then it did not constitute a defect. It is apparent that the instructions given on the point of insufficiency or defect at the place complained of were quite general and that the requested instructions were appropriate and would have been of aid to the jury in their deliberation on the case. Yet can it be said that the error of refusing the requested instructions prejudiced the defendant so as to require reversal of the judgment? An examination of the record does not convince us that a result more favorable to the defendant would have been arrived at by the jury had the instructions been given. Under the statutes, secs. 2829 and 3072*m*, Stats., " . . . all irregularities and errors [shall] be deemed inconsequential, in the absence of reasonably clear indications that the adverse party was prejudiced thereby." *Oborn v. State*, 143 Wis. 249, 126 N. W. 737; *Wiese v. Riley*, 146 Wis. 640, 132 N. W. 604; *Solberg v. Robbins L. Co.* 147 Wis. 259, 133 N. W. 28. The contention is made that the jury was left to conjecture whether or not it was the crack between the draw and approach, or the unevenness in the surfaces between the draw and the approach, or the absence of a flap over the crack that constituted the defect. The jury, under the evidence, was re-

quired to determine whether the condition of the crack, under the surrounding conditions of slope and unevenness of the floor surfaces on each side, made the bridge defective and dangerous to persons using it to drive teams thereon. The inquiry pertains to a matter concerning which the jurors' general knowledge would enable them to form an intelligent opinion, and explanatory instructions by the court could have aided them but little in their deliberation. The requested instruction whereby the court was asked to direct the jury that the evidence of having a covering over the crack was insufficient to support a finding that such covering was practical or that any had been used on bridges was properly refused under the state of the evidence in the case. These were jury questions in the light of the evidence in the case. We are of the opinion that the court properly submitted the question of plaintiff's contributory negligence to the jury. There is no reversible error in the record.

By the Court.—The judgment appealed from is affirmed.

MITCHELL and others, Respondents, vs. LYONS and another, Appellants.

May 4—May 23, 1916.

Quieting title: Tax deeds: Fraud of tenant in common: Conveyances in fraud of creditors: Cancellation of instruments: Pleading: Amendment to conform to proof: Disclaimer: Dismissal: Judgment, upon whom binding: Parties: Rights of purchaser at execution sale: Appeal: Costs: Briefs: Unnecessary printing.

1. Where a tenant in common whose duty it was, under an agreement with his cotenant, to pay the taxes failed to do so but furnished money for a third person to purchase the tax certificates and then procured the assignment thereof to his mother-in-law, who took with notice of the facts and paid no consideration, tax deeds issued to the mother-in-law were properly set aside at the suit of the cotenant.

2. So, also, a mortgage and deed executed by said tenant in common to hinder and delay his creditors were properly set aside.
3. In an action to quiet title, where the complaint asked for cancellation of only one tax deed, but the proof showed also the invalidity of another tax deed to the same defendant covering a small part of the land, the court properly set aside the latter deed also, treating the complaint as amended to conform to the proof, there being no showing that the defendant was prejudiced by the failure to plead the second deed.
4. In an action to quiet title, the grantee in tax deeds who pleaded a disclaimer but also defended on the merits and tendered no release as required by sec. 3186, Stats., was not entitled to a dismissal.
5. Where the grantor in a deed was a party to an action to quiet title, but the grantee was not, a judgment vacating the deed is not binding on such grantee.
6. In an action to quiet title, brought by the purchaser at an execution sale, the judgment debtor, who was the grantor in a mortgage and deed under which the defendant claims, but who does not himself claim any title, is not a necessary or proper party.
7. The purchaser of land at an execution sale to whom a deed has been issued may maintain an action in equity to set aside conveyances in fraud of creditors made before the judgment was docketed.
8. Costs of printing respondents' brief, which violated Supreme Court Rule 11, are not allowed in this case although such violation was satisfactorily explained.

APPEAL from a judgment of the municipal court of Langlade county: T. W. HOGAN, Judge. *Affirmed.*

Action to quiet title. The plaintiff *Henry R. Mitchell* purchased the interest of his brother James Mitchell in the land in question at an execution sale in October, 1912, under a judgment against James Mitchell and received a deed January 12, 1914. Previously he owned an undivided one-half interest in the land in common with his brother James. The latter went into possession of the land in 1906 under an agreement to pay the taxes thereon, and remained in possession till September 19, 1912. In the meantime two tax deeds upon the land in favor of the defendant *Olive Lyons* were executed, based upon the sales of 1906 and 1907. June 10, 1911, James Mitchell executed a mortgage upon the land to the defendant

J. Wirig for $1,400, and on September 19, 1912, he gave a deed of the land to *J. Wirig.* July 31, 1914, *Henry R. Mitchell* deeded a one-half interest in the land to the plaintiffs *Kingsbury* and *Henshaw,* and since September 19, 1912, *Wirig* and *Kingsbury* and *Henshaw* have been in possession of the land. *Olive Lyons* was never in possession thereof. Before she was served with a summons in the action she deeded the land to one Kayhart, and she pleaded a disclaimer but did not execute or tender a release. This action was brought to cancel the two tax deeds to *Olive Lyons* and the mortgage and deed to *J. Wirig.* The court set aside the conveyances mentioned, including the deed from *Lyons* to Kayhart, and the defendants, *Lyons* and *Wirig,* separately appealed.

Geo. W. Latta, for the appellant *Lyons.*

Henry Hay, for the appellant *Wirig.*

For the respondents there was a brief by *Morson & Bowler,* and oral argument by *H. F. Morson.*

VINJE, J. The court adjudged the tax deeds to *Olive Lyons* void because James Mitchell, whose duty it was to pay the taxes under his agreement with his brother, caused one Duchac to purchase the tax certificates and furnished him with the money therefor; that Duchac at Mitchell's request assigned the certificates to *Olive Lyons,* the mother-in-law of James Mitchell, who has resided with him since 1901; that *Olive Lyons* took with notice of the facts and paid no consideration for the assignment to her. The court also adjudged the mortgage of $1,400 given *Wirig* and the deed later executed and delivered to him void because both were made for the purpose of hindering and delaying the creditors of James Mitchell. The findings as to the invalidity of the tax deeds to *Olive Lyons* and the mortgage and deed to *Wirig* are sustained by the evidence.

The complaint asked for the cancellation of only one tax deed, but the other, covering only a very small portion of the land, was received in evidence and vacated by the judgment.

The court no doubt considered the complaint amended to correspond to the proof, and properly so. There is no showing that the defendant *Lyons* was in any way prejudiced by the fact that the second tax deed was not pleaded. She also contends that, since she pleaded a disclaimer and showed by her plea that she had conveyed title to Kayhart, the action should have been dismissed as to her with costs in her favor. In addition to the disclaimer she also answered to the merits and made and tendered no release as required by sec. 3186, Stats. 1915. On the contrary, she defended the case on the merits and therefore was not entitled to a dismissal.

That part of the judgment vacating the deed from *Olive Lyons* to Kayhart is not binding upon the latter, as he was not made a party to the action. *Menasha W. W. Co. v. Winter,* 159 Wis. 437, 448, 150 N. W. 526.

The defendant *Wirig* claims that James Mitchell should have been made a party to the action, since he was the grantor of the deed and the maker of the mortgage—two instruments declared void by the judgment. Since the plaintiff *Henry R. Mitchell* under the execution sale succeeded to all the interest that James Mitchell had in the lands, the latter was not a necessary nor a proper party. Both the defendant *Wirig* and the plaintiff *Henry R. Mitchell* deny any title in James Mitchell and he claims none, so he had no interest in the litigation.

The further claim is made by both defendants that the plaintiff *Henry R. Mitchell,* being a purchaser at an execution sale under a judgment against James Mitchell, has no right to question the validity of conveyances made by James Mitchell prior to the entering of the judgment against him. Such claim was negatived in *Eastman v. Schettler,* 13 Wis. 324, and the rule there announced, that the purchaser at an execution sale to whom a deed has been issued may maintain an action in equity to set aside conveyances in fraud of

creditors made before the judgment was docketed, has not been departed from. A *dictum* to the effect that if the conveyance was made for the purpose of delaying creditors it was void and the judgment became a lien upon the land, was explained in *French L. Co. v. Theriault,* 107 Wis. 627, 632, 83 N. W. 927, as applying to the case then in hand, in which the judgment had been enforced by a seizure of the land under the execution sale, but the doctrine of the case was not questioned. In *Gilbert v. Stockman,* 81 Wis. 602, 611, 51 N. W. 1076, 52 N. W. 1045, it is said that *Eastman v. Schettler* goes to the extreme limit of any adjudication in this court, but it is apparent that such a view was based upon the *dictum* referred to rather than upon the actual decision made.

Supreme Court Rule 11 provides that the respondent's brief may state the leading facts or conclusions of law which the evidence tends to prove. Counsel for respondents have set out under this head over 100 pages of the evidence by question and answer. Upon the oral argument counsel frankly admitted that their brief was not in accordance with the rule and made a satisfactory explanation why it was not. Still appellants should not be required to pay for the printing of such a brief and no costs for printing same will be allowed.

By the Court.—Judgment affirmed.

RAYWORTH, Respondent, vs. GOODRICK and another, Interveners, Appellants.

May 4—May 23, 1916.

Judgments: Setoff: Attorneys' liens: Priority.

1. **A motion to offset judgments is addressed to the sound discretion of the court and governed by equitable principles, and when the judgments are in the same action, or actions growing out of the same subject matter, the right of setoff is generally deemed superior to the claim of the attorney in either action for services and disbursements therein.**
2. **The lessor of a farm, claiming that the lease had been breached, commenced an action of replevin and took possession of the crops. In such action the court refused to receive evidence as to claims of the lessor against the lessee connected with the operation of the farm and provided for in the lease, or as to a counter charge of the lessee against the lessor, but suggested that those matters be tried in another action; and the lessee had judgment in the replevin action for the value of the property taken, over and above the rent due. Thereafter in a separate action upon said claims the lessor had judgment against the lessee. *Held*, that both judgments related to the same subject matter, and that the right of the lessor to have them offset was superior to the right of the lessee's attorneys to a lien on the judgment in the replevin action.**

APPEAL from an order of the municipal court of Langlade county: T. W. HOGAN, Judge. *Affirmed.*

Motion to offset judgments, opposed by attorneys for defendant, who claim a lien for services.

On November 15, 1913, the husband of the plaintiff, *Margaret Rayworth,* was the owner of a farm and leased the same to the defendant William Henry at an agreed annual rental of $1,000 and taxes, the same to be a lien on the crops raised on the farm. On February 12, 1914, the plaintiff became the owner of the farm and the lease. Among the provisions of the lease there was one clause which in substance stated that, if the defendant failed or neglected to do the work in seasonable time and in a husbandlike manner and to furnish the necessary seed for planting, the lessor reserved the right

to have the work done by others and to furnish the seed, and the cost and expense thereof were to be added to the amount of the rent, and the title to all the produce raised on the farm was to remain the property of the lessor until a sufficient amount thereof was marketed to pay the rent and taxes and such additional moneys as were expended by the lessor for the work done and seed furnished as therein agreed.

In October, 1914, the plaintiff, claiming that the defendant had breached the lease, commenced an action of replevin and took possession of all the crops then on the farm. The replevin action was tried by a jury, and the value of the crops assessed at $1,460. The jury further found that neither the plaintiff nor the defendant was damaged, and judgment was entered in favor of the defendant Henry and against the plaintiff for the sum of $1,460, less the rental of $1,000, or for $460 and costs, amounting in all to $532.69. No evidence was received as to the amount of taxes due and no evidence as to the state of the account between the parties. On the trial of the replevin action plaintiff's counsel, against the objection of defendant's counsel, attempted to prove claims against the defendant amounting to several hundred dollars, a great part of which was connected with the operation of said farm and provided for in the lease. The defendant in the replevin action, on the other hand, claimed that he had a counter charge of $110 against the plaintiff, a part of which was related to the work done on the farm and part not. The trial judge refused to receive evidence as to these matters and confined the trial in the replevin action strictly to the question of whether or not the plaintiff was entitled to the possession of the property at the time she replevied it, its value, and the damage, if any, sustained by either party, upon the ground that the other matters in controversy involved a long accounting, and made the following suggestions:

"If plaintiff's contention is true that defendant owes her on account unsettled, she cannot be seriously injured, as she has a lien on any judgment defendant obtained against her, or can restrain the collection thereon until the accounts between

them are settled and adjusted. On application and proper showing the court can properly and undoubtedly will restrain the issuing of an execution for a reasonable length of time, thus giving both parties an opportunity to adjust their differences."

Pursuant to the suggestion of the court an action was brought by plaintiff herein on the disputed account, the issues were tried by a jury, and resulted in a judgment in favor of the plaintiff and against the defendant in this action for $425.03, and judgment was entered for that amount with costs, which were taxed at $68.21. The judgment in the replevin action in favor of the defendant Henry and against the plaintiff *Rayworth* was docketed May 29, 1915. Plaintiff's judgment in the accounting action against Henry was entered November 27, 1915. On May 25, 1915, Messrs. *Goodrick & Goodrick,* interveners, who represented the defendant Henry in the trial of the replevin action, filed an attorney's lien for $307.43 upon the judgment which the defendant Henry had obtained in the replevin action, gave notice thereof to the plaintiff, and in June thereafter Henry assigned the judgment to his attorneys as further security. On July 10th an execution was issued upon the judgment in the replevin action, and on July 25, 1915, upon application of the plaintiff, an order was made staying the enforcement of the execution until the trial and final entry of judgment in the accounting action. After the accounting action had been tried and judgment rendered in favor of the plaintiff as stated, plaintiff moved that the judgment in her favor in the accounting action be set off against the judgment against her and in favor of Henry in the replevin action.

The question arises, Is the lien of *Goodrick & Goodrick,* attorneys for Henry, prior and superior to the right of the plaintiff to have the judgments set off?

The trial court set off the judgments, less an item of $12 for board and $17.40 for merchandise, and an order was entered accordingly and the judgment of Henry against the

plaintiff was satisfied, the difference being paid into court. Messrs. *Goodrick & Goodrick* appeal from the order and ask that their judgment be reinstated and their attorney's lien be declared prior and superior to the right of the plaintiff to have the judgments set off.

For the appellants there was a brief by *Goodrick & Goodrick,* and oral argument by *A. B. Goodrick.*

Geo. W. Latta, for the respondent.

ROSENBERRY, J. It appears without dispute that the plaintiff at the time of the trial of the replevin action was the owner of the claims which she endeavored to present in that action as a setoff to the defendant's claim for the value of the property taken by her in the replevin action over and above the rental value of the premises. Under all the circumstances of this case the fact that she derived her legal title to these claims by purchase from the trustee of her husband's bankrupt estate is not material. The Langlade Mercantile Company, from which the claim was purchased, was owned by the husband. The items of the account were paid partly by the plaintiff and partly by the husband and the account kept on the books of the Langlade Mercantile Company. Looking at the substance rather than the form of things, we see no reason why these items did not constitute a proper setoff in the replevin action. The claims related directly and specifically to the transactions had between the parties relating to the leased premises. Had the court permitted the plaintiff to prove her claims in the replevin action, the amount of the judgment in favor of the defendant Henry and against the plaintiff would have been decreased by the amount thereof. At the suggestion of the court the matters were withdrawn from the replevin action and later tried in another action. It is not claimed in this case that there was any attempt to comply with the provisions of sec. 2591*a,* Stats. The right of the interveners is based upon the well established rule that an attorney has an equitable lien upon a judgment when rendered,

by operation of law, for his services and disbursements in that action. The interveners claim that their right to such lien is prior and superior to that of the defendant to have the judgment set off, under the decisions in *Stanley v. Bouck,* 107 Wis. 225, 83 N. W. 298, and *Rice v. Garnhart,* 35 Wis. 282. The general rule of law has been established by this court as follows:

"The motion of a judgment debtor to apply his judgment upon one against him owned by his judgment creditor, is addressed to the sound discretion of the court and governed by equitable principles. The right of setoff, when the judgments are in the same action, or actions growing out of the same subject matter, is generally deemed superior to the claim of the attorney in either action for services and disbursements therein. *Yorton v. M., L. S. & W. R. Co.* 62 Wis. 367, 21 N. W. 516, 23 N. W. 401. But where the judgments are in actions having no connection with each other, the equitable right of the attorney, who has rendered services and incurred expenses in obtaining one of such judgments, to be paid out of it, is deemed superior to the right of the judgment debtor to have that judgment paid by applying upon it the judgment owned by him against his judgment creditor. *Rice v. Garnhart,* 35 Wis. 282; Jones, Liens, § 220; *Benjamin v. Benjamin,* 17 Conn. 110; *Diehl v. Friester,* 37 Ohio St. 473; *Wells v. Elsam,* 40 Mich. 218; *Kinney v. Robison,* 52 Mich. 389, 18 N. W. 120." *Gauche v. Milbrath,* 105 Wis. 355, 357, 81 N. W. 487.

In this case the trial court held, and the holding is strongly supported by the evidence, that the judgment in the accounting action related to the same subject matter as the judgment in the replevin suit, and that the right of the plaintiff to have the judgment set off is therefore superior to the lien of the attorneys for the defendant. To hold otherwise, under the circumstances in this case, would be to hold that the court did not have power to do justice between the parties, as it was at the suggestion and direction of the court that the matter was disposed of in two actions instead of one. The order of the trial court is therefore right.

By the Court.—Order affirmed.

COLE and another, Respondents, vs. CHRISTENSEN, Appellant.

May 5—May 23, 1916.

Libel: Newspaper publication imputing business dishonesty: Instructions to jury: Punitory damages: Disallowance to correct error in instruction.

1. A notice or warning published in a newspaper, charging buyers of live stock with fraudulently misrepresenting to farmers the condition of the market in order to induce them to sell their stock, imputed business dishonesty and was libelous *per se.*
2. A statement in the charge that "damages are of two kinds—compensatory, or punitory, and exemplary," could not have misled the jury where the judge proceeded thereafter to differentiate between compensatory and exemplary or punitory damages at considerable length.
3. A statement in the charge that the jury "must not understand that the presence or absence of actual malice or ill will has any bearing on the question of punitory damages," and that "plaintiffs are entitled to such damages if they have been libeled," was prejudicially erroneous; but the punitory damages having been separately assessed, the error may be corrected by disallowing them.

APPEAL from a judgment of the circuit court for Polk county: W. B. QUINLAN, Judge. *Modified and affirmed.*

Libel. Plaintiffs were partners and buyers of live stock in Polk county. Defendant caused to be published in a local paper the following notice:

"*Farmers Take Notice.*

"I wish to notify people having stock to sell, to look out for *Cole & Brown* whenever they wish to buy your stock. They misrepresented the prices to me, claiming the market prices were down when they were not. They also said they were to ship to Duluth and instead shipped to South St. Paul. They purchased my steers for 4½ cents per pound, and sold them for 5½ cents per pound, a gain of 1 cent per pound. This can be proved if necessary. L. C. CHRISTENSEN."

Defendant pleaded the truth of the publication. The jury returned a verdict for the plaintiffs, assessing compensatory damages at $200 and punitory damages at $50, and from

judgment thereon, amounting in all to $304.21, defendant appeals.

For the appellant the cause was submitted on the brief of *Morris E. Yager.*

For the respondents there was a brief by *W. T. Kennedy* and *C. S. Roberts,* and oral argument by *Mr. Kennedy.*

WINSLOW, C. J. Only two contentions are made which we deem it necessary to discuss: (1) that the published article is not libelous, and (2) that there was prejudicial error in the charge.

1. The article was unquestionably libelous *per se;* it charged the plaintiffs with fraudulently misrepresenting to farmers the condition of the market in order to induce them to sell their stock. This is an imputation of business dishonesty and hence libelous. *Gottbehuet v. Hubachek,* 36 Wis. 515; *Singer v. Bender,* 64 Wis. 169, 24 N. W. 903; *Robinson v. Eau Claire B. & S. Co.* 110 Wis. 369, 85 N. W. 983.

2. The bill of exceptions states that the trial judge stated to the jury in his charge that "damages are of two kinds—compensatory, or punitory, and exemplary." This is incorrect, of course, and it is hardly to be supposed that the trial judge actually said it, but rather that there was error on the part of the reporter. This is rendered more certain by the fact that the trial judge proceeded thereafter to differentiate between compensatory and exemplary or punitive damages at considerable length. In view of this fact the jury could not have been misled in any event.

After charging the jury fully that punitive damages were such as were awarded by way of punishment and could only be given when the defendant was actuated by malice or ill will, also that the granting of such damages rested in the discretion of the jury, the trial judge said: "But you must not understand from this that the presence or absence of actual malice or ill will has any bearing on the question of punitory

damages. Plaintiffs are entitled to such damages if they have been libeled." This is plainly error and must have been prejudicial on the subject of punitory damages. Inasmuch, however, as these damages are separately assessed, the error may be corrected by now disallowing them.

By the Court.—Judgment modified as of its date by reducing the same to $254.21, and as so modified affirmed without costs, except that respondent is to pay the fees of the clerk of this court.

McLENNAN, Appellant, vs. CHURCH and others, Respondents.

May 5—May 23, 1916.

Vendor and purchaser: Breach of contract by vendor: Specific performance: Equity: Legal relief: Fraudulent collusion to break contract: Liability: Measure of damages.

1. One who contracts for the purchase of land has the right to rely upon his vendor's either having the title or procuring it so as to carry out his promise.
2. Where an action has been commenced in good faith to obtain equitable relief, and it subsequently appears that such relief cannot or ought not to be granted, but plaintiff is shown to have suffered a remediable wrong in the transaction forming the groundwork of the action, entitling him to be compensated by money damages, the court may, and where justice clearly requires it should, retain the cause and afford such relief, and make the same efficient by providing for a recovery as in an ordinary legal action or by provisions appropriate to a judgment for equitable relief, as may be best suited to the circumstances of the particular case.
3. Although the facts of a case warrant only legal relief and were known to the plaintiff when he commenced his action for equitable relief, the court may in such action grant the legal relief, where the constitutional right of trial by jury would not be unduly prejudiced.
4. Fraud in law is remediable as well as fraud in fact.
5. A third person who, knowing of a contract for the sale of land and knowing the facts which showed that such contract had not lapsed, offered the owners a higher price for the land and there-

by induced the breaking of said contract and a sale and conveyance to himself, was guilty of a fraud upon said vendee, even though he ignorantly supposed that a mere default of the latter had terminated his contract rights.

6. The breaking of such contract was an unlawful act rendering all who concerted together to that end liable for the damages caused thereby to the vendee.
7. Under the circumstances stated, the third person who obtained a conveyance of the land from the owners merely took their place and acquired no greater rights in the land than they had, as against the vendee named in said contract.
8. The contract in this case being for the sale of two tracts of land and being signed by and binding upon the owner of one tract only, specific performance could not be enforced; but in an action therefor the court could give judgment, against all the parties responsible for the breach of the contract, for the vendee's damages caused by such breach.
9. The vendee's recovery in such case should not be limited to the amount of purchase money he had paid and interest thereon, but should equal his entire interest in the contract, including the reasonable value of the land to him over what he owed thereon.
10. The damages must be determined as of the time of the breach of the contract, and neither the use of the land thereafter nor the use of money tendered by the vendee under the contract and which remained idle is to be considered.
11. Ordinarily, the damages recoverable for breach of a land contract by failure to convey, over and above payments made, is the difference between the contract price and the market value at the time of the breach, with interest to the date of the judgment.
12. Full compensatory damages are recoverable for the breach of a land contract where the vendor refuses to convey according to his promise and there is any element of bad faith involved, or where he did not have the title when he contracted but took his chances of obtaining it.
13. Where the breach is of a tortious character the liability therefor extends to such damages as are the natural and ordinary consequences of the act, regardless of whether or not such damages were in contemplation by the parties at the time of making the contract as the probable result of a breach of it.
14. Where at the time of the breach of a contract to sell land for $4,200 the vendee therein had contracted to sell it to a third person for $5,200, and the breach was the result of collusion between the owners of the land and said third person, who purchased from such owners for $4,900, the value of the land to the vendee at the time of the breach must, in computing his damages, be deemed to have been $5,200.

APPEAL from a judgment of the circuit court for Polk county: MARTIN L. LUECK, Judge. *Modified and affirmed.*

Action for specific performance of a land contract.

The following is, in substance, the findings of fact made by the trial court, and indicates the nature of the evidence and of the issues raised by the pleading:

1st. On October 11, 1912, defendants *L. F. Church* and wife contracted in writing to sell plaintiff, for $4,200, and convey to him by March 1, 1913, the south half of the northeast quarter of section 31, town 32, range 15, west, in Polk county, Wisconsin.

2d. About the contract date, plaintiff paid on the agreement $674. January 22, 1913, he paid, at said defendants' request, $21.16 taxes on the southwest quarter of the northeast quarter of said land, and, at defendant *Ray Church's* request, $12.71 taxes on the other forty.

3d. At the date of the contract, plaintiff knew said *Ray Church* owned the first mentioned forty and that in November, 1912, defendants *L. F. Church* and his wife executed a deed of both forties to plaintiff and left it with said *Ray Church,* expecting it would be executed by him and delivered to plaintiff by March, 1913, upon the balance back on the contract being paid, but it was not acknowledged by *L. F. Church* and wife nor signed by *Ray Church,* as plaintiff well knew.

4th. After the deed was signed by *L. F. Church,* he removed to Minnesota and plaintiff caused some plowing to be done on the land without the knowledge or consent of *Ray Church.*

5th. In December, 1912, plaintiff, at *Ray Church's* request, paid off a mortgage on the latter's land at an expense of $523.75, expecting he, in due time, would convey the land under the contract. February 22, 1913, plaintiff, at *L. F. Church's* request, paid off a mortgage on the latter's land at an expense of $320, expecting that he intended to convey said

land as he had agreed, and paid $4 to bring the abstract down to date.

6th. Defendant *Ray Church,* until March 6, 1913, induced plaintiff to believe that the aforesaid deed would be executed and delivered in consummation of the land contract, and, so, neglected to make due tender of the balance due thereon and demand such delivery.

7th. February 18, 1913, plaintiff contracted in writing to sell the land to defendant *Curby* for $5,200, of which $100 was paid down.

8th. About March 25, 1913, when *Curby* expected to pay up on his contract and go into possession of the land, he was informed by plaintiff that he was unable to get title thereto from the *Churches* and, April 6th, thereafter, said *Curby* surrendered his contract and received back the down payment, advising plaintiff that he had acquired title to the land from the *Churches,* as the fact was, he having purchased of them at $4,900.

9th. *Curby* did not intend to wrong plaintiff. He made his purchase believing that plaintiff's contract with the *Churches* had expired; but he had knowledge of facts requisite to charge him with such information as plaintiff could have given him upon inquiry in respect to the matter.

10th. About March 6, 1913, *L. F. Church* obtained the aforesaid deed he had signed for plaintiff, and then *Ray Church* informed plaintiff that he had lost all rights under his contract by reason of delay.

11th. Shortly after April 1, 1913, plaintiff duly tendered to *Curby* $2,683.79 and demanded a conveyance of the premises, presenting an instrument for execution to that end, which tender and demand were refused. Said *Curby* was then in possession of the premises under his deed from the *Churches* which had been duly recorded.

12th. When the deed was made to *Curby* he mortgaged the premises to *L. F. Church* for $3,000 of the purchase money which he owes.

13th. The annual rental value of the premises is $250.

Upon such facts the court held this: Plaintiff is not entitled to specific performance of his contract. He is entitled, as to *Ray Church,* to have the mortgage, which he paid off at said *Church's* request, revived. He is entitled to judgment against *L. F. Church* for $1,555.87 paid out on account of his contract, with interest on the sums composing the aggregate from the time he paid the same, and to have the judgment made a lien upon the premises in question prior to the $3,000 mortgage given by *Curby* for purchase money. *Curby,* as to the *Churches,* is entitled to pay off said judgment for $1,555.87 and interest and to be credited therewith on his mortgage indebtedness and to have the mortgage securities deposited with defendants' attorneys subject to the direction of the court for his protection. Payment of the $1,555.87 and interest as aforesaid shall relieve the premises of any claim of plaintiff.

Judgment was rendered accordingly with provision as to costs, except the aggregate of the personal judgment was fixed at $1,801.49 and was made a lien superior to the $3,000 mortgage upon one forty-acre tract, the title to which was in *L. F. Church* at the time he contracted with plaintiff.

Plaintiff appealed, claiming that he should have specific performance as prayed for, or be made as good as he would have been had he been permitted to carry out his contract to sell the premises to *Curby.*

For the appellant there was a brief by *Kennedy & Yates,* and oral argument by *W. T. Kennedy.*

For the respondents there was a brief signed by *C. C.* and *A. E. Coe,* and oral argument by *Arthur E. Coe.*

MARSHALL, J. The first complaint made on behalf of appellant is that the court erred in finding that, at the time of making the contract with *L. F. Church,* plaintiff knew *Ray Church* held the title to one forty of the land. That does not seem to be material, so we will pass the question of whether

the finding has support in the evidence. *L. F. Church* contracted to sell both forties to appellant. That he might properly have done and expected to perform by procuring the title to the forty which was in *Ray Church* before maturity of the agreement or at such maturity procure co-operation of *Ray Church* to enable him to consummate his promise. Appellant, obviously, had a right to rely upon his executory vendor either having the title or procuring it so as to carry out his promise. The trial court probably thought the circumstance, as found, was material to whether appellant was so warranted in appealing to equity for relief as to be vital to the question of whether he could recover damages of a legal nature in the action in case of relief by judgment for specific performance not being proper.

It is not the law, as seems to have been thought, and as counsel for respondents suggest, that in all cases where specific performance is sought and is not obtainable because of facts known to the plaintiff when he commenced his action therefor, that the court cannot or should not grant other relief by way of compensation, even though it be such as would be a proper subject of an action at law for damages. There are decisions along that line, as *Combs v. Scott,* 76 Wis. 662, 45 N. W. 532, cited to our attention by counsel for respondents; but they do not indicate the limitation of the rule on the subject. It may be broadly stated thus: In case of an action having been commenced in good faith to obtain equitable relief, and it subsequently appearing that such relief cannot, or ought not to be, granted, but the facts disclosed by the evidence show that plaintiff has suffered a remediable wrong in the transaction forming the groundwork of the action, entitling him to be compensated by money damages, the court may, and where justice clearly requires it under the circumstances, should retain the cause and afford such relief, and make the same efficient by provisions for a recovery as in an ordinary legal action or as are appropriate to a judgment for equitable relief, as may be best suited to the circumstances of the par-

ticular case. *Stevens v. Coates,* 101 Wis. 569, 78 N. W. 180; *Gates v. Paul,* 117 Wis. 170, 94 N. W. 55; *Knauf & Tesch Co. v. Elkhart Lake S. & G. Co.* 153 Wis. 306, 141 N. W. 701.

The cases cited and many others which might be referred to leave no manner of doubt as to the extent of the doctrine above mentioned as it has been applied in recent years. In the first case this language was used:

"The rule applies where a cause of action in equity once existed, but from the happening of some event it no longer exists, or *a person, in good faith believing he has a cause of action in equity, alleges facts accordingly, yet fails as to some essential element on the trial because it never existed, but, nevertheless, establishes a good cause of action for recovery at law.*"

In the next case this was held:

"If one *sues in equity in good faith* and fails to establish his cause but shows a state of facts entitling him to recover at law, the court, having rightfully obtained jurisdiction for a proper purpose, may retain the cause and grant just such relief as upon the facts the plaintiff appears entitled to, whether at law or in equity."

In the last case the rule was thus stated in respect to the precise point here involved:

"The mere circumstance of itself that appellant knew the facts when the action was commenced would not require a dismissal because of facts not being established warranting equitable relief if, notwithstanding, good cause for legal relief was shown. Having properly acquired jurisdiction, in such a case, a court of equity has very broad power to wind up the entire controversy appearing from the pleadings and evidence, whether legal or equitable relief, or both, be required."

Under our judicial system, there are no distinctions between actions at law and suits in equity. We have only the civil action of the Code as an instrumentality to redress or prevent wrongs, triable with or without a jury according to whether the nature of the relief demanded is legal or equi-

table. There is but one court and one form of action; therefore, up to the point where the constitutional right of trial by jury would be unduly prejudiced by going further, there is no want of power to grant legal relief in an action commenced to secure equitable relief only, and the practice to grant such relief, in the interest of a speedy and economical settlement of controversy has been so progressive that it can no longer be properly said that where the facts of a case warrant only legal relief and were known to the plaintiff when he commenced his action for equitable relief, the court will not, should not, or cannot afford the former. Though a person may know the facts entitling him only to legal relief when he commences his action for equitable relief, he may be excusably mistaken and invoke that judicial remedy without any design, or there being reasonable ground to suspect a design, to thereby invade his adversary's right of trial by jury, and the ends of justice can best be attained by finally terminating the litigation in the pending action. In such a case there is no want of jurisdiction to retain the cause for that purpose. In many such cases there is no dispute about the facts. If it were dismissed and a new action brought for legal relief, in the finality, the controversy would turn on questions of law.

The foregoing does not need support by citation of precedents. In most, or in all, cases where legal relief is granted in an action for equitable relief, legal issues are involved appropriate to an action of a legal nature; so that was never, necessarily, regarded as going to the jurisdiction of the court to grant the latter. It was not so regarded before the constitution was adopted guaranteeing the right of trial by jury and such guaranty did not change the situation. *Stilwell v. Kellogg,* 14 Wis. 461; *Dane Co. v. Dunning,* 20 Wis. 210. The holdings to the effect that where the facts entitling the plaintiff to only legal relief were known to him when he commenced his action for equitable relief, the court will not grant the former, followed an ancient judicial rule which it was perfectly

competent for the court to modify so as not to exclude cases commenced in good faith, and with reasonable ground therefor, to obtain one form of relief when another form only is obtainable, and it has been so extended as we have indicated.

Complaint is made because of the finding that defendant *Curby* purchased the land of the *Churches* in good faith without any intention of defrauding appellant.

Curby knew when he negotiated with the *Churches* and dealt with them that plaintiff held the contract in question, and knew all the circumstances requisite to charge him with knowledge that such contract had not lapsed. The fact that he did not know the legal effect of such circumstances, and ignorantly supposed that a mere default of appellant terminated his contract rights, and in that state of mind dealt with the *Churches,* may relieve him from any taint of moral turpitude, but not of remediable responsibility. Fraud in law is remediable as well as fraud in fact. It was certainly a fraud on appellant for *Curby* and the *Churches* to collude, as they evidently did, to consummate a sale to *Curby* and thus to rob appellant of the value of his bargain under his contract. With knowledge of the obligation to appellant under such contract, *Curby* offered the *Churches* an advance upon the price named therein, as an inducement to *L. F. Church* to break his agreement and to sell to him. He was improperly held guiltless of any fraudulent intent. The breaking of the contract was an unlawful act rendering all who concerted together to that end liable for the damages caused thereby to appellant. *Martens v. Reilly,* 109 Wis. 464, 84 N. W. 840; *White v. White,* 132 Wis. 121, 111 N. W. 1116; *Hull v. Doheny,* 161 Wis. 27, 152 N. W. 417; *Ditberner v. Bess, ante,* p. 264, 157 N. W. 817.

Did the trial court err in holding that appellant was not entitled to specific performance of the *L. F. Church* contract by *Curby?* From what has been said, it is clear that *Curby* merely took the place of the *Churches;* having taken title to

the land with knowledge of all the facts, he came into possession of no greater right as against appellant than they had. According to the facts found, appellant could not have successfully maintained specific performance against them because the one who signed the contract to sell the premises only owned one of the forties. Whether *Ray Church* became a party to the contract was not found and no specific objection is presented in the argument of counsel for appellant on that score. We must assume that the trial court was of the opinion he did not become such party so that specific performance could be enforced against him. There is testimony tending to prove the contrary but it is not clear and satisfactory. In any event, counsel only raise the question, in general, as to whether, on the facts found, the court erred in not granting specific performance as against *Curby,* for the two forties of land. On that it is considered that the answer must be in the negative because there is no finding to the effect that appellant's contract was binding on the owners of both forties. The most the court could do under those circumstances was to grant appellant judgment for such damages as would, as fully as practicable, repair the wrong done him by the failure to convey the land according to such contract.

What has been said results in the conclusion that the court erred in limiting appellant's compensatory damages, recoverable in this action, to the money he paid out for purchase money of the land and interest to the date of the judgment, aggregating $1,801.49, and in making that the personal liability of *L. F. Church* only, and the costs a liability of him and *Ray Church.* All were equally liable, under the circumstances, and the entire interest which appellant had in the contract according to its terms, so far as the same could be ascertained from the evidence, should have been allowed to him. That included the reasonable value of the land to him over what he owed thereon, and what was awarded to him. What he paid out for work on the land was included in such value,

so the same need not be dealt with in the several features called to our attention. As the damages must be determined as of the time of the breach of the contract, the use of the land thereafter does not cut any figure. Neither does the use of the money which it is claimed by appellant he allowed to remain idle from the time he made the tender, which was soon after the maturity of the contract, until the termination of the litigation.

All recoverable matters seem to have been included in the judgment except the difference between what the land stood appellant at the time of the breach and what the property was then reasonably worth to him. Ordinarily, the damages recoverable for breach of a land contract by failure to convey, over and above payments made, is the difference between the contract price and the market value at the time of the breach, with interest to the date of the judgment. *Muenchow v. Roberts,* 77 Wis. 520, 46 N. W. 802; *Maxon v. Gates,* 136 Wis. 270, 116 N. W. 758; *Arentsen v. Moreland,* 122 Wis. 167, 99 N. W. 790; *Brink v. Mitchell,* 135 Wis. 416, 116 N. W. 16.

There has been much discussion in cases on this subject, yet there is no conflict but what full compensatory damages are recoverable where the vendor refuses to convey according to his promise and there is any element of bad faith involved, or he did not have the title when he contracted, but took his chances of obtaining it. In *Muenchow v. Roberts,* the court held:

"The plaintiff is entitled to recover, if at all, the full value of his bargain. The true measure of such value is the value of the land the defendant contracted to sell to him, estimated at the time the contract was broken, less what the plaintiff agreed to pay therefor. This is the general rule in this state in an action by a purchaser to recover damages for the breach of an executory contract to sell either real or personal property, where no part of the consideration has been paid."

It would be varied of course to suit the situation created by partial payment. The court recognized that there might be

exceptions to that rule. If there are any, this case is not within them.

The above rule is based on the general principle of liability for breach of contract that the limit of recovery is such damages as may be reasonably considered to have been in contemplation by the parties at the time of making the contract as the probable result of a breach of it. Where the breach is of a tortious character, the liability extends to such as are the natural and ordinary consequence of the act, whether they might have been in the contemplation aforesaid or not. That is elementary. Here there was such tortious element, in that the three persons concerted together to break the contract.

The natural and ordinary consequence of the wrongful conduct of defendants was to prevent appellant from consummating his deal with *Curby*. For that purpose the land was worth to appellant, at the time of the breach, $5,200. That *Curby* would have taken the land at that price had *L. F. Church* kept his contract, is clear from the evidence. When the former found that the latter was willing to break his contract and to sell to him direct, he induced appellant to accept a surrender of the $5,200 contract and, straightway, entered into the transaction which led to this litigation, and divided the profits with his co-conspirators. So it is considered that the value of the land to appellant at the time of such transaction was $5,200.

At the time indicated the cost of the land to appellant, as we have computed it, taking the amount due on the contract with the payments which had been made, making up the $1,555.87, mentioned in the findings, with interest to such time, was $4,276.02, or $923.98 less than he would have obtained for the land had it not been for the wrongful conduct of defendants. Those figures may not be exactly right, but they are as nearly so as can be ascertained from the evidence with reasonable certainty. That sum fairly represents the value of appellant's bargain under his contract, which he lost

as the natural consequence of the breach of it. Such sum with interest thereon down to the date of the judgment, making in all $1,051.69, should have been awarded appellant in addition to the $1,801.49, making in all $2,853.18.

The judgment appealed from must be modified so as to be against all the defendants for damages, and the costs as heretofore taxed, and so such damages will be $923.98 for plaintiff's loss of his bargain, with interest thereon from the date of the breach of contract to the date of the judgment, in addition to the $1,555.87 for money paid out, and $245.62 interest thereon, making the aggregate $2,853.18, and by such other changes in the judgment as will make all its parts harmonize with the change of $1,801.49 damages to the larger amount, and so the judgment for such damages will be enforceable by execution against all defendants and be a lien upon one forty of land superior to the $3,000 mortgage, as originally provided,—the rights of all parties to be protected as to such mortgage and otherwise also as originally provided. The judgment might be made otherwise enforceable, but since the manner indicated will, as it seems, fully remedy the wrong to plaintiff, it is thought best not to disturb the disposition of the matter by the trial court any further than is necessary to accomplish that end. Upon the case reaching the trial court, the judgment may be recast and re-entered, as of its original date, so as to harmonize, in terms, with this decision.

By the Court.—The judgment appealed from is modified as indicated in the opinion and affirmed as modified, plaintiff to have the right to a re-entry of it in the court below, as of its original date, so it will be in form, as so modified. Plaintiff is awarded full costs in this court.

CHURCH, Respondent, vs. NASH, imp., Appellant.

May 5—May 23, 1916.

Reformation of instruments: Mistake: Omission of name of one vendee in land contract: Husband and wife: Tenancy by entireties: Possession of land: Constructive notice to purchaser.

1. In an action to reform a land contract a finding that it was the intention of the parties that the wife of the vendee named therein should also be a party and that her name was omitted by mistake is *held* to be sustained by evidence showing, among other things, that the word "parties" was used throughout the contract in referring to the vendees; that following the husband's name was the word "and," with a blank apparently for the wife's name; that the scrivener indorsed the contract as given to both husband and wife; and that she signed the purchase-money notes and paid some of them after her husband's death.
2. Where both husband and wife are the purchasers under a land contract she takes the whole property upon his death.
3. A defendant who purchased at guardian's sale the interest of minor children in land while plaintiff was in possession thereof, with knowledge that plaintiff had bought the property or claimed an interest therein under some agreement with the parents of the minors, and at a time when the record showed no title in either the parents or the minors, was chargeable with notice of plaintiff's rights and title.

APPEAL from a judgment of the circuit court for Polk county: MARTIN L. LUECK, Judge. *Affirmed.*

This action was brought to reform a written contract for the purchase of land, for specific performance of the contract as reformed, to remove a cloud from the title, and for general relief.

On the 5th day of August, 1907, one Wm. Cross and wife made a contract to sell lot 11 and the south half of lots 9 and 10, block 20, in the village of Clear Lake, Wisconsin, to Fred Turretin and Marian Turretin, for the sum of $800, $20 being paid down and seventy-eight notes of $10 each given for the balance, signed by Marian Turretin and Fred Turretin, her husband.

It is alleged in the complaint that by mutual mistake of the parties to the contract in drafting the same the name of defendant Marian Turretin was omitted as one of the vendees in the contract; that after Fred Turretin had paid some of said notes he died, and after his death his widow, Marian Turretin, continued in possession and paid some of said notes, and thereafter and on March 5, 1912, sold and assigned the contract to the plaintiff, who paid the balance of said notes.

The defendant McLennan took a conveyance of the fee from Cross, and the defendant *Nash* on February 3, 1914, bought at guardian's sale the interest of the minor children of Fred Turretin, deceased. The defendant *Nash* put in issue the allegations of the complaint and the case was tried on the issues thus raised.

The court below found that Wm. Cross was the owner of the real estate in question, and that he and his wife entered into a contract to sell the property for $800, and that Fred Turretin executed and delivered to said Cross seventy-eight notes of $10 each, which were signed by defendant Marian Turretin and Fred Turretin; that the notes and contract were part of the same contract to purchase, and that it was the intention of the parties to insert the name of said defendant Marian Turretin in the contract after the words "Fred Turretin and" and before the word "parties," but through the omission and neglect of the scrivener who drew the contract the name of Marian Turretin was omitted therefrom as one of the vendees; that on March 5, 1912, the defendant Marian Turretin assigned the contract to the plaintiff, and at that time plaintiff paid her for said assignment $447.66 and went into possession and continued in possession and paid the remainder of the seventy-eight notes as they became due, being twenty-eight in all; that Fred Turretin died prior to March 5, 1912, and paid in his lifetime forty-five of said notes, and Marian Turretin after his death and before said assignment paid five of said notes; that Fred Turretin died intestate and

left him surviving his widow, Marian Turretin, and four children, only heirs at law; that defendant McLennan became the owner of the fee of said lots May 8, 1913; that February 3, 1914, defendant Marian Turretin as special guardian of said children deeded said lots to defendant *Nash,* describing the interest conveyed as an equity of redemption and describing said infants as the infant heirs of Fred Turretin, deceased; that defendant *Nash* had knowledge of sufficient facts to put him on inquiry, and that said inquiry, if prosecuted with reasonable diligence, would have led him to a knowledge of the situation as it actually existed between the plaintiff and defendant Marian Turretin and the true nature of her rights and title under the contract.

The court concluded that the defendant Marian Turretin was on March 5, 1912, by right of survivorship, the owner of the contract in question, and by her assignment the plaintiff became the owner of the property, subject only to the unpaid balance on the contract, and upon payment of said balance plaintiff became entitled to a deed from defendant McLennan; and that the deed to *Nash* dated February 3, 1914, is a cloud upon plaintiff's title which he is entitled to have removed.

Judgment was entered accordingly, from which the defendant *Nash* appealed.

For the appellant there was a brief by *Kennedy & Yates,* and oral argument by *W. T. Kennedy.*

For the respondent there was a brief signed by *C. C. & A. E. Coe,* and oral argument by *Arthur E. Coe.*

KERWIN, J. The controlling question in this case is whether Marian Turretin was a party as joint vendee with her husband in the contract with Cross and wife.

It is true that the evidence is meager on the point, but the court below found that it was the intention of the parties that Marian Turretin should be a party to the contract, but

through omission and neglect of the scrivener who drew the contract her name was omitted. We think the evidence is sufficient to support the finding. The making of the contract and notes was one transaction, and while Marian Turretin was not present when the contract was drawn she signed the notes given for the purchase money and paid part of them after her husband's death. She also sold the contract to the plaintiff. This evidence tends to show that she at least considered that she had an interest in the contract and tends to prove that she understood that she was a party to it. Moreover, the written contract itself tends to show that it was the intention of the parties that Marian Turretin was a party to the contract. The contract is signed only by the vendors. The plural, "parties," is used throughout the contract in referring to the vendees. After description of property in the contract it proceeds: "And the parties of the first part hereby further agree that they will on demand of the parties of the second part . . ." And in the first part of the contract, where both parties to the contract are referred to, after naming the parties of the first part the contract continues: "And Fred Turretin and ....., parties of the second part," a blank being left in the contract apparently for the name of Marian Turretin. It also appears that the scrivener who wrote the contract indorsed thereon, "Wm. Cross and wife to Fred Turretin and wife." Marian Turretin also testified that she supposed the assignment conveyed good title to plaintiff, subject only to the unpaid balance, and that if she paid up under the contract she would get a deed. Upon the record we are convinced that the court below was justified in finding that the contract was made with Fred Turretin and Marian Turretin, his wife. This being so, upon the death of Fred Turretin Marian took the whole property. *Wallace v. St. John,* 119 Wis. 585, 97 N. W. 197; *Fiedler v. Howard,* 99 Wis. 388, 75 N. W. 163.

It is further contended that defendant *Nash* did not have

notice of the rights of plaintiff in the property or that plaintiff claimed the whole title to the property. Aside from the possession of plaintiff there is considerable evidence that tends to show that *Nash* ought to have known that plaintiff claimed an interest in the property. *Nash* admitted that he knew plaintiff had bought the property or had some kind of an agreement with the Turretins that he was claiming under. But the possession of the plaintiff and the condition of the title at the time *Nash* bought was sufficient notice to put him on inquiry. The deed to *Nash* was made February 3, 1914, and the contract between Cross and wife and Turretin and wife was not recorded until April 13, 1914, so the title as it appeared of record at the time *Nash* bought was not in the Turretins or either of them, but appeared of record to be in Cross. It is clear, therefore, that *Nash* was chargeable with notice of the rights and title of plaintiff. *Pippin v. Richards,* 146 Wis. 69, 130 N. W. 872.

It follows that the findings and conclusions of the court below are right, and the judgment must therefore be affirmed.

By the Court.—The judgment is affirmed.

KERWIN, Appellant, vs. CHIPPEWA SHOE MANUFACTURING COMPANY, imp., Respondent.

May 5—May 23, 1916.

Negligence: Injury from nails in shoes: Liability of manufacturer.

A manufacturer of shoes who fastened the soles with nails in such a way as to give them the appearance of being sewed is not liable to one who was induced by such deception to purchase the shoes from a retailer and was injured by nails penetrating his foot and causing infection,—the nailed sole not being inherently dangerous, and the deceptive or negligent manner of constructing the shoe not rendering it so imminently dangerous to the life, limb, and health of the wearer that the manufacturer ought to have anticipated that it naturally and probably would produce such an injury.

APPEAL from an order of the circuit court for Douglas county: JAMES WICKHAM, Judge. *Affirmed.*

This is an action brought by the plaintiff to recover damages for injuries alleged to have been sustained by reason of the wrongful and negligent conduct of the defendants.

The complaint alleges that the *Chippewa Shoe Manufacturing Company* owned and operated a shoe factory in the city of Chippewa Falls; that they were engaged in the manufacture and sale of men's shoes to retail dealers; that the company manufactured a shoe known as "Original Chippewa Shoes" and sold some of these shoes to the defendant Rovelsky, a retailer; that in the month of July, 1914, the plaintiff called at the store of the defendant Rovelsky for the purpose of buying a pair of shoes; that he explained to Rovelsky that he wanted shoes that had the soles sewed on and not nailed; that Rovelsky sold him a pair of "Original Chippewa Shoes," representing that the soles were sewed on; that shortly after plaintiff had purchased the shoes and while wearing them in the usual way a nail or nails in the sole of the left shoe penetrated the plaintiff's left foot, from which infection resulted, and the plaintiff had to have several operations to save his leg, and finally had to have some of the bones of the foot removed; that these shoes, in truth and in fact, had nails in the soles to fasten them; that this fact was known to the defendant shoe company at the times it made and sold the shoes to Rovelsky and at the time plaintiff bought them; that the defendant shoe company knew such nails were dangerous to the life, limb, and the health of any person wearing them; that the company so constructed the shoes as to give them the appearance of being sewed and that this was intended to and did deceive the public and the plaintiff, which deception induced the plaintiff to buy and wear the shoes and to cause him the injuries complained of. It is further alleged that the defendant shoe company in the exercise of reasonable care would have known that the negligent and improper placing and locating of the nails would cause injuries such as the

plaintiff received; that plaintiff was in the exercise of ordinary care in the purchase and use of the shoes, and that he did not and in the exercise of ordinary care could not know of the existence of the nails or of the danger therefrom until after his foot had been penetrated and the resulting infection had been occasioned.

The defendant the *Chippewa Shoe Manufacturing Company* demurred to the complaint on the ground that the complaint does not state facts sufficient to constitute a cause of action. The defendant J. Rovelsky did not demur, but answered the complaint, so the question of his liability is not here involved. The circuit court sustained the demurrer of the defendant the *Chippewa Shoe Manufacturing Company,* and it is from the order sustaining the demurrer that this appeal is taken.

For the appellant the cause was submitted on the brief of *W. P. Crawford.* He cited *Hasbrouck v. Armour & Co.* 139 Wis. 357, 121 N. W. 157; *Haley v. Swift & Co.* 152 Wis. 570, 140 N. W. 293; *Statler v. Geo. A. Ray M. Co.* 195 N. Y. 478, 88 N. E. 1063; *MacPherson v. Buick M. Co.* 153 App. Div. 474, 138 N. Y. Supp. 224; *Olds M. Works v. Shaffer,* 145 Ky. 616, 637, 140 S. W. 1047; *Johnson v. Cadillac M. C. Co.* 194 Fed. 497; *Cadillac M. C. Co. v. Johnson,* 221 Fed. 801; *Gerkin v. Brown & Sehler Co.* 177 Mich. 45, 143 N. W. 48; *Pullman Co. v. Ward,* 143 Ky. 727, 137 S. W. 233; *Mazetti v. Armour & Co.* 75 Wash. 622, 135 Pac. 633; *Ketterer v. Armour & Co.* 200 Fed. 322; *Roberts v. Anheuser Busch B. Asso.* 211 Mass. 449, 98 N. E. 95; *Wilson v. J. G. & B. S. Ferguson Co.* 214 Mass. 265, 101 N. E. 381; *Peterson v. Standard Oil Co.* 55 Oreg. 511, 106 Pac. 337; *Cunningham v. C. R. Pease H. F. Co.* 74 N. H. 435, 69 Atl. 120, 20 L. R. A. N. S. 236; *Marsh v. Usk H. Co.* 73 Wash. 543, 132 Pac. 241.

For the respondent there was a brief by *Murphy & Browne,* attorneys, and *T. J. Connor,* of counsel, and oral argument by *J. Howard Browne.*

SIEBECKER, J. The plaintiff claims that the defendant shoe company is liable to him under the rule which holds a manufacturer or dealer in articles liable to persons other than the immediate purchaser for injuries caused by the wrongful and negligent conduct of the manufacturer or dealer. The general rule of liability of a manufacturer or seller of an article to persons other than his immediate purchaser was considered and applied in *Hasbrouck v. Armour & Co.* 139 Wis. 357, 121 N. W. 157. It was there held that, as a general rule, a manufacturer or dealer of an article is not liable to persons other than the immediate purchasers of such articles, for want of any contractual relationship and privity between the manufacturer and the persons buying from the manufacturer's immediate purchaser. The court also recognized the well established exceptions to this rule under which it has been held that the law imposes a duty on a manufacturer or seller of an imminently dangerous article, in favor of the user or consumer of such article, to exercise care for their protection commensurate with the peril and dangers involved. Under the following exceptional facts and circumstances a manufacturer or dealer was considered to be liable to third persons if such article causes an injury which was reasonably to be anticipated:

(1) "A manufacturer or dealer who puts out, sells, or delivers, without notice to others of its dangerous qualities, an article which invites a certain use, and which article is not inherently dangerous, but which by reason of negligent construction he knows to be imminently dangerous to life and limb, or is manifestly dangerous when used as it is intended to be used."

(2) "A manufacturer or dealer who puts out and sells articles inherently dangerous, without notice of their dangerous nature, or with a misleading notice, or negligently in any other way."

(3) "A manufacturer or dealer who makes and sells an article intended to preserve or affect human life is liable to third persons sustaining injury caused by his negligence in preparing, compounding, labeling, or directing the use of the article."

It is clear from the facts alleged in the complaint that the last foregoing (3) class of cases does not embrace this case. It remains to be ascertained whether the facts alleged constitute a cause of action which is embraced in either of the other two classes above specified. It is obvious from the allegations of the complaint that the presence of a nail in the sole of the shoe plaintiff wore is the danger complained of in this case as the proximate cause of his injury. The allegations of the complaint must be interpreted in view of this fact. The allegations to the effect that plaintiff desired and could only wear shoes having sewed soles and that the defendant Rovelsky warranted the shoes to be such shoes cannot affect the responsibility of the manufacturer. Much stress is placed in argument on the allegation that the defendant knew, or in the exercise of reasonable care should have known, that nails were used in soling the shoes and that such nails were imminently dangerous to the life, limb, and health of the wearer, in that such nails would, without the knowledge of the wearer, "penetrate through the skin into the flesh of the foot, causing and resulting in infection, blood-poisoning, and the consequences thereof." We must interpret these allegations in their ordinary significance in the light of common knowledge. It is obvious that a nail used to fasten a shoe sole is not of an inherently dangerous nature. To say otherwise would be a contradiction of the universal experience of mankind in wearing "nail-soled shoes." Can it then be said that a nail used to fasten on a shoe sole, in a deceptive or negligent manner in the construction of the shoe, rendered the shoe so imminently dangerous to the life, limb, and health of the wearer that the defendants ought to have anticipated that it naturally and probably would produce such an injury? The facts alleged do not present a case of such an inherent danger in the material used or the manner of manufacturing the shoe. Nor do the facts stated show that the alleged negligent manner of constructing the shoe made it an imminently dangerous ar-

ticle in the light of the nature of the defect and the uses and purposes for which it was designed.

Under these facts and circumstances of the case it must be held that the complaint fails to state a cause of action against the defendant *Chippewa Shoe Manufacturing Company,* and the court properly sustained the demurrer to the complaint.

By the Court.—The order appealed from is affirmed.

KERWIN, J., took no part.

CHRISTMAN, Respondent, vs. CHRISTMAN, Executor, and others, Appellants.

May 5—May 23, 1916.

Life insurance: Married woman as beneficiary: Vested interest: Change of beneficiary, how made: Divorced wife.

1. Under sec. 2347, Stats. 1915, a married woman who is made the beneficiary in a life insurance policy takes a vested interest therein subject to be divested in the manner reserved in the policy contract and not otherwise.
2. Thus, where the right reserved in the policy to change the beneficiary could be exercised only by giving written notice to the company during the continuance of the policy, the insured could not without having given such notice dispose of the policy by will.
3. The vested right acquired by a wife when she is made the beneficiary in a life insurance policy is not divested by a subsequent divorce from the insured.

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

Action to determine who is entitled to the proceeds of an insurance policy of $2,000 on the life of Farmer W. Christman, deceased. On or about December 28, 1901, the deceased insured his life in the New York Life Insurance Com-

pany, making the policy payable to *Emily M. Christman,* his wife. The policy contained the following clause:

"The insured, having reserved the right, may change the beneficiary or beneficiaries at any time during the continuance of this policy by written notice to the company, at the home office, provided this policy is not then assigned."

No change of beneficiary was ever made on the policy. On or about the 25th of January, 1913, *Emily M. Christman* instituted divorce proceedings against her husband and was granted a decree on March 12, 1913. Farmer W. Christman died on the 14th of November, 1913, leaving a will, dated the same day, in which he bequeathed the proceeds of the policy to Harmon A. Christman, *Vivian Sweet, Blanche Sweet,* and *Harrison E. Christman.* The will was admitted to probate December 6, 1913, and *Harrison E. Christman* qualified as executor thereof. Proofs of the death of Farmer W. Christman were approved by the New York Life Insurance Company on April 11, 1914, and the company was then notified by *Harrison E. Christman,* as executor, and by his attorney not to pay the proceeds of the policy to the plaintiff, *Emily M. Christman.* After the commencement of this action the New York Life Insurance Company paid the amount of the policy into court and was discharged from liability thereon. Upon these facts the court entered judgment in favor of plaintiff, and the defendants appealed.

Charles E. Pierce, for the appellants.

For the respondent the cause was submitted on the brief of *Thos. S. Nolan.*

VINJE, J. Under the provisions of sec. 2347, Stats. 1915, and the construction given it on the rehearing in *Nat. L. Ins. Co. v. Brautigam, ante,* p. 270, 157 N. W. 782, when the insured made his wife the beneficiary she took a vested interest in the policy, subject to be divested in the manner reserved in the policy contract and not otherwise. The only method

of change reserved was by written notice to the company during the continuance of the policy. No such notice was ever given the company. On the other hand, the insured sought to dispose of the policy by will, which, were it not for the vested interest his wife had in the policy by virtue of the statute, he might have done. *Clark v. Durand,* 12 Wis. 223; *Rawson v. Milwaukee Mut. L. Ins. Co.* 115 Wis. 641, 92 N. W. 378; *Opitz v. Karel,* 118 Wis. 527, 95 N. W. 948; *Meggett v. Northwestern Mut. L. Ins. Co.* 138 Wis. 636, 120 N. W. 392; *Armstrong v. Blanchard,* 150 Wis. 31, 136 N. W. 145.

But since the statute divested the insured of all rights in the policy except those specifically reserved, he was limited to the terms of such reservation in making an effectual disposition of it. Not having exercised the power reserved, he could not dispose of the policy in any other manner. In the *Brautigam Case* the change of beneficiary was made pursuant to the reservation and was therefore sustained as a valid exercise of the power reserved.

Since the wife took a vested interest in the policy at the time she was made a beneficiary, which interest could be divested only in the manner reserved in the policy contract, it becomes unnecessary to determine whether or not she sustained the status of wife for one year after the decree of divorce was granted. Conceding that she did not sustain such status, the policy would still belong to her because her interest therein had not been effectually divested.

By the Court.—Judgment affirmed.

CRONIN, Appellant, vs. JANESVILLE TRACTION COMPANY and another, Respondents.

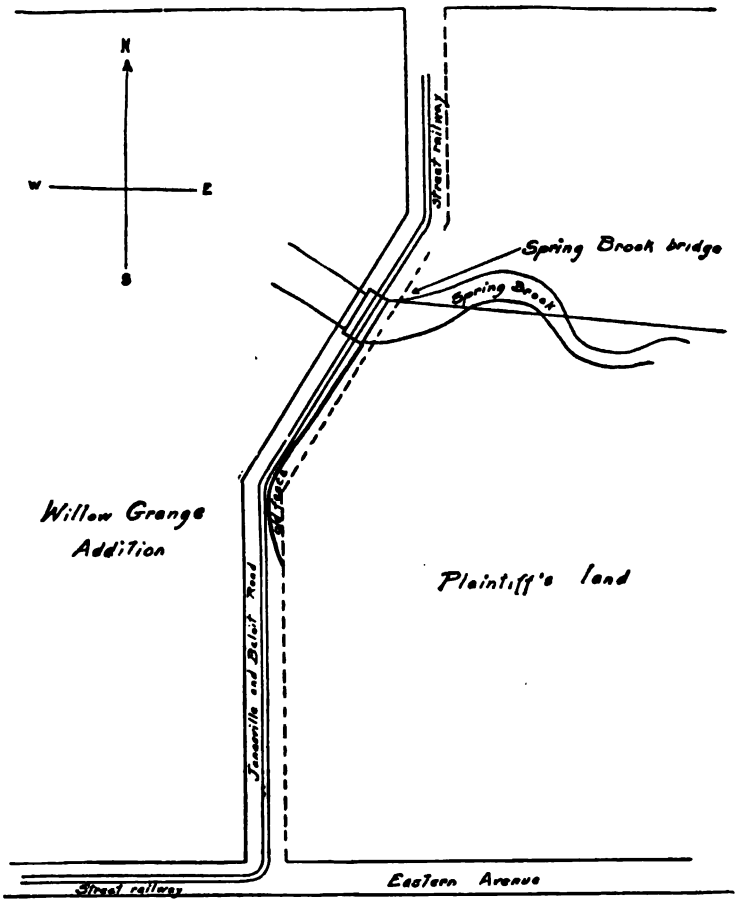
May 5—May 23, 1916.

Deeds: Boundary of land conveyed: Highways: Dedication: Width: Old fences: Street railways: Occupation of land by consent: Condemnation: Mistake in remedy: Amendment of proceeding.

1. A deed describing the land conveyed as bounded on one side by a certain road gave the vendee title to the center of the highway, there being no words in the deed expressly or necessarily limiting the boundary to the side of the highway.
2. A highway by parol dedication and user being limited by the extent of such user, a fence which has stood in its present location and marked the east line of such a highway for upwards of fifty years establishes the line of such highway at the place in question.
3. Land on the west side of a highway by user was platted by the owners, and on the plat the highway was represented as being four rods wide, with its center line on their eastern boundary. East of such center line, however, within the limits of the highway so represented, an old fence marked the east line of the highway by user, and the land east thereof was occupied up to such fence. Afterwards the owners who made said plat bought the land east of the highway, but the fence remained and the occupancy up to it continued. Later said owners conveyed the last mentioned land to plaintiff, describing it as bounded on the west by the highway—not by the highway according to the plat. *Held*, that the old fence continued to mark the east line of the highway, there never having been any effective dedication of any land east of it.
4. Where the owner of land, by express or tacit consent, has allowed a railway company to occupy his land for railway purposes, he cannot bring an action for trespass, but must proceed under the condemnation statute to have his compensation and damages assessed.
5. Where, in an action to enjoin street and interurban railway companies from occupying a part of plaintiff's land adjoining the highway with their railway embankment, it appeared that plaintiff had consented to such occupancy by permitting the embankment to exist without objection for nearly three years, so that his only remedy was by condemnation proceedings under sec. 1852, Stats. 1913, the court should, under sec. 2836*b*, Stats. 1915 (Laws 1915, ch. 219, sec. 2), have made an order granting leave to plaintiff to file a petition for condemnation against the defendant company which built and owns the embankment.

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Affirmed as to one respondent; reversed as to the other.*

Action in equity to enjoin the defendants from occupying a part of plaintiff's real estate with their railway embankment. The plaintiff owns a parcel of land of about twenty-four acres in the city of Janesville, lying east of the Beloit and Janesville road (now called Beloit avenue) and north of Eastern avenue. Its location will more readily be understood by reference to the plat here inserted:



The defendant traction company, a domestic corporation, constructed its street railway upon said Beloit avenue a number of years ago under a franchise from the city. The other defendant, the *Rockford & Interurban Railway Company,* is an Illinois corporation which operates interurban cars over the same tracks, also having a franchise from the city so to do. The plaintiff has duly released all damages resulting from the operation of interurban cars on the street. About the year 1912 the street railway tracks were moved further east than they had previously existed, especially at and about the corner southwest of Spring Brook bridge. In their new location the east rail of the track for a number of rods comes within a few feet of the fence (marked on the plat "old fence") and the embankment sustaining the track completely covers the fence and extends several feet eastward, filling up a ditch east of the fence. This is the supposed encroachment of which the plaintiff complains. He claims that the fence is the true line, while the defendants claim that the road is four rods in width and that the true line is a considerable distance east of the fence along the broken line indicated in the plat.

The court found in accordance with the defendants' contention and dismissed the complaint, and the plaintiff appeals.

The cause was submitted for the appellant on the brief of *Edward H. Ryan,* and for the respondents on that of *Thos. S. Nolan.*

WINSLOW, C. J. It is quite clear that the trial court was wrong as to the location of the east line of the highway at the place in question. There was no dispute as to the facts. The Janesville and Beloit road has existed for more than sixty years. There is no proof as to how or by whom it was first laid out, but it has been traveled longer than the time named. For upwards of fifty years, according to the uncontradicted evidence, the so-called "old fence" has stood in its

present location and marked the east line of the road as used. The plaintiff acquired title to the premises marked "plaintiff's land" on the plat in August, 1895, and has occupied them ever since, claiming that the fence was the line of the highway, just as his predecessors in title did for thirty years previously. The plaintiff's deed described the land as bounded on the west by the Janesville and Beloit road. This, of course, gave him title to the center of the highway, there being no words in the deed expressly or necessarily limiting the boundary to the side of the highway. *Gove v. White,* 20 Wis. 425.

So far as the east half of this highway is concerned it is only a highway by parol dedication and user and is limited by the extent of such user, which, at the place in question, ended at the fence.

The situation is different as to the west half of the highway. The property on the west side of the highway was owned by George L. and Sarah Carrington, who in May, 1891, platted it and recorded the plat under the name of Willow Grange addition. Upon this plat Beloit avenue was represented as a four-rod highway with boundaries coinciding with the broken lines on the plat. This, of course, was a complete dedication of the west half of the four-rod strip, but as to the east half it had no effect. True, the evidence further shows that the Carringtons bought the Cronin tract in July, 1892, held it until August 21, 1895, when they sold it to the plaintiff. The fence, however, remained, as well as the adverse occupation up to the fence, and when the Carringtons deeded to the plaintiff they bounded the land on the west by the highway. Had their deed to *Cronin* described the west boundary as the highway "according to the plat of Willow Grange addition," there would be strong ground for claiming that the plaintiff would be bound to recognize the highway as four rods in width according to the plat, but the boundary was fixed at the Janesville and Beloit road, the east line of which had been established, as we have seen, for many years.

So the court should have found that the fence line was the east line of the highway at this point.

It does not follow, however, that judgment for the plaintiff should have been rendered. Street railway companies now have the right of eminent domain. Secs. 1863*a*, 1863*b*, Stats. 1913. Within certain limitations (immaterial here) their powers and duties are the same in this respect as the powers and duties of commercial railroads. *In re Plowright,* 140 Wis. 512, 122 N. W. 1043.

It was long ago held by this court that when the owner of land, by express or tacit consent, has allowed a railway company to occupy his land for railway purposes, he cannot bring an action for trespass, but must proceed under the condemnation statute to have his compensation and damages assessed. *Hanlin v. C. & N. W. R. Co.* 61 Wis. 515, 21 N. W. 623. This holding has been followed ever since. *McCord v. Eastern R. Co.* 136 Wis. 254, 116 N. W. 845; *Pabst B. Co. v. Milwaukee,* 157 Wis. 158, 147 N. W. 46.

In the present case it appears that the embankment was placed on the plaintiff's land substantially as it now exists, nearly three years before the commencement of this action, and there is no evidence showing any protest or objection thereto by the plaintiff. This must be held conclusive evidence of consent. The plaintiff's remedy, therefore, was by commencing condemnation proceedings himself under the provisions of sec. 1852, Stats. 1913.

It is not necessary, however, that the plaintiff's action be dismissed. Under sec. 2836*b*, Stats. 1915 (Laws 1915, ch. 219, sec. 2), the trial court is required, in case of mistaken remedy like the present, to make an order granting leave to the plaintiff to amend his action or proceeding within a reasonable time, costs being in the discretion of the court, and to prosecute the amended action or proceeding in that court or in the proper court having jurisdiction, as the case may be. Only in case of neglect or refusal to so amend should the action be dismissed.

In the present case the court should have found as a fact that the fence marked the east line of the highway and that the plaintiff have leave to file (within a time to be fixed by the court) a petition for condemnation against the *Janesville Traction Company* (the corporation which owns and built the railroad and embankment in question). It does not appear that the *Interurban Company* is a necessary or proper party to the condemnation proceedings and as to it the action was properly dismissed.

By the Court.—Judgment of dismissal and costs affirmed as to the *Rockford & Interurban Railway Company* and reversed as to the *Janesville Traction Company,* and action remanded for further proceedings in accordance with the opinion. But one bill of costs to be taxed in this court, namely, in favor of the appellant and against the last named respondent.

VILLAGE OF KIEL, Appellant, vs. INDUSTRIAL COMMISSION OF WISCONSIN and another, Respondents.

May 5—May 23, 1916.

Workmen's compensation: Who are "employees:" "Policemen:" Village marshal: Enforcing state law.

The night marshal of a village, having the powers and duties of a village peace officer, is a "policeman" and therefore an "employee" of the village within the meaning of sec. 2394—7, Stats.; and the village is liable to make compensation for an injury accidentally sustained by him in performing a duty incident to his office, whether in the enforcement of a village ordinance or of a state law.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action to set aside an award of the *Industrial Commission.*

Mary Hanske is the widow of Edmond Hanske, deceased. He was fatally injured while performing duties of night mar-

shal of plaintiff. That occurred August 23, 1914, by reason of deceased attempting to prevent one, Lettenberger, from violating the speed laws of the state in plaintiff's streets, and to arrest him for such violation. The marshal and policemen were empowered by ordinance, among other things, to preserve the peace and good order in the village, and to arrest and remove from the streets all persons in any way found guilty of disorderly conduct. The village had no police force other than the marshal. He was selected by the village board to perform the duties of a policeman at night, under the name of night marshal, and to act as janitor of the city hall. The village board, pursuant to its authority to have a marshal and policemen, selected the deceased to do police duty, giving him the title of night marshal, and adding that of janitor because he was required to act as such. Contemplating such a selection, the board invited bids to perform the duties of the double place. The deceased responded, his bid was accepted, and he was selected by ballot. He filed an official bond and constitutional oath. He was performing the duties of his place when injured. After his decease, his widow duly made a claim against the village under the Workmen's Compensation Act for her loss. The *Commission* allowed her $2,640, besides bills for medical attendance and nurse hire, upon the ground that when Hanske was injured, he and the village were subject to the provisions of the Workmen's Compensation Law and the injury happened while he was performing service growing out of and incidental to his employment. The circuit court confirmed the award and rendered judgment accordingly.

For the appellant there was a brief by *Nash & Nash,* and oral argument by *E. G. Nash.*

For the respondent *Industrial Commission of Wisconsin* there was a brief signed by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, which brief was concurred in by *Byron H. Stebbins,* guardian *ad litem* for the re-

spondent *Hanske;* and the cause was argued orally by *Mr. Gilman* and *Mr. Stebbins.*

A brief was also filed by *Michael Levin,* as *amicus curiæ.*

MARSHALL, J. Counsel for appellant concede, as the fact is, that if the deceased was a policeman, within the meaning of the Workmen's Compensation Law, and appellant is liable if he was injured, while engaged, as such, in endeavoring to enforce a state law from which the village derived no special benefit in its corporate capacity, the judgment is right and should be affirmed. Therefore, counsel at the outset in their brief, say the only question it is desired to raise is whether a village marshal is a policeman within the meaning of such law, suggesting that such question really covers the two matters.

Counsel's suggestion as to the scope of the single question is supported by *West Salem v: Industrial Comm.* 162 Wis. 57, 155 N. W. 929, where this court held that if a policeman is injured in performing a duty incident to his office, whether it is that of enforcing a municipal ordinance or of enforcing a penal law of the state, he is such official under sec. 2394—7, Stats., which provides that policemen shall be deemed employees within the meaning of sub. (1) of such section. The one whose injury was the subject of that action was engaged, when injured, in the enforcement of a state law, and the point was made that there could be no recovery; but the court decided otherwise. The infirmity in the contention to the contrary is obvious. A policeman is deemed to be an employee, as we have seen, and sec. 2394—3 provides for liability of the employer for the accidental injury and consequent death of the employee "where, at the time of the accident, the employee is performing service growing out of and incidental to his employment." No exception is made. Therefore, it can make no difference whether a policeman, in the line of his duty, is engaged in the enforcement of a state law, or of a

municipal ordinance, when injured. It is within the scope of the powers and duties of a village peace officer, empowered as the marshal was in the particular instance, to do what the deceased did at the time of, and which resulted in, his injury. That seems to be conceded; but if not, there can be no fair doubt about it. So if he was a policeman within the meaning of the Workmen's Compensation Law, as counsel so freely concede, we need not go further in considering the case.

Though we have been favored with quite a lengthy argument on the questions suggested on behalf of appellant, in view of what the court has heretofore decided, it is not thought best or necessary to review such argument in reaching the right of the matter involved. This case, as we view it, does not present any new question. In *State ex rel. Brown v. Appleby,* 139 Wis. 195, 120 N. W. 861, it was held that a municipal marshal, in the broad general sense, is a policeman; that it is the nature of the duties of the place and not, necessarily, the title of the incumbent, which is the determining factor as to what such incumbent is. That was followed in *West Salem v. Industrial Comm.* 162 Wis. 57, 155 N. W. 929, where it was distinctly held that a village marshal, in doing police duty, is, in respect thereto, a policeman and hence an employee, under the Workmen's Compensation Law.

The decisions referred to certainly cover this case in respondents' favor at all points. To go further and discuss the matter at length and with the degree of detail which the arguments of counsel invite, would rather tend to confuse than to illumine, and take from the otherwise value of the decision rendered, as a precedent. We will therefore rest the result on the previous determinations; assuring counsel, however, that we do not fail to appreciate the labor they have bestowed upon the case and have not omitted to examine their briefs with care to see if there is anything therein not covered by our former decisions.

We may well say here, what has been, in terms, or effect, said many times before, that the Workmen's Compensation

Law is a humane remedial enactment, which was placed upon our statute books to give vitality to the idea that personal injury losses incident to employee service, are as much a part of the labor cost of such service as wages paid and should, in some practicable way, be so treated. Therefore the legislative language used in the act to that end should be as liberally construed to effect the beneficent purpose intended, as it reasonably can be. It is useless to try to minimize the scope of such language by confining the meaning of words to any technical signification. Rules of strict construction are not applicable to the law, as the results of the many cases which have come to this court amply illustrate, and should efficiently operate to prevent litigation grounded on logic which would narrow the scope of the enactment. Construction, where construction is permissible, which will give to the law its fullest reasonable scope, is thought to be what is required to carry out the legislative purpose, in harmony with what was said in *Sadowski v. Thomas F. Co.* 157 Wis. 443, 449, 146 N. W. 770.

By the Court.—The judgment is affirmed.

STATE EX REL. CITY OF MILWAUKEE VS. CIRCUIT COURT FOR MILWAUKEE COUNTY and another.

May 6—May 23, 1916.

Appeal: New trial: Failure to bring to trial: Dismissal: Waiver of right.

1. The right to have an action dismissed for failure to comply with sec. 3072, Stats., may be waived as effectually while the record remains in the supreme court as after it has been returned to the circuit court.
2. The evidence produced upon a motion to dismiss an action because of noncompliance with sec. 3072, Stats., showing negotiations and agreements between the attorneys for the respective parties, is *held* sufficient to warrant the trial court's decision that defendant had waived the right to a dismissal on that ground.

MANDAMUS to the circuit court for Milwaukee county and the judge thereof. *Dismissed.*

For the petitioner there was a brief by *Clifton Williams,* city attorney, *Chas. W. Babcock* and *Walter J. Mattison,* assistant city attorneys, and oral argument by *Mr. Williams* and *Mr. Babcock.*

I. A. Fish, for the respondents.

KERWIN, J. The petitioner moved to dismiss the case of Fred Miller Brewing Company, plaintiff, vs. City of Milwaukee, defendant, for the reason that sec. 3072, Stats., had not been complied with, and the plaintiff in said case of Fred Miller Brewing Company vs. City of Milwaukee moved to put the case upon the calendar for trial. The motion of defendant, petitioner here, was denied and the motion of plaintiff, Fred Miller Brewing Company, was granted.

The petitioner thereupon obtained from this court an alternative writ of *mandamus* commanding the circuit court for Milwaukee county and *Hon. W. J. Turner,* judge thereof, to dismiss the action of Fred Miller Brewing Company vs. City of Milwaukee or show cause to the contrary.

Due return was made to the writ. There was a demurrer to the return and supplemental return and the argument in this court was upon the demurrer.

The main question upon the merits here is whether the petitioner waived the right to have the statute, sec. 3072, complied with. This issue was raised upon motion to dismiss and affidavits presented on both sides more or less conflicting. There is no dispute but that the record remained in this court more than a year after the order of affirmance in the case of *Fred Miller B. Co. v. Milwaukee,* 155 Wis. 81, 143 N. W. 1066.

Some point is made by counsel for petitioner to the effect that there could be no waiver while the record remained in this court. We fail to appreciate the force of this argument.

We fail to see why a waiver may not occur as effectually while the record remains in this court as after it has been returned to the circuit court. Counsel for respondents also contends that sec. 3072, Stats., should not be held to apply to appeals from intermediate orders when the lower court is affirmed; and that the supervisory jurisdiction of this court should not be invoked to reverse decisions of trial courts on questions of law and fact by writ of *mandamus.*

In the view we take of the case we do not find it necessary to decide these contentions of respondents, because we are convinced that we should not disturb the ruling of the circuit court to the effect that the petitioner waived the provisions of sec. 3072, Stats. *State ex rel. Forrestal v. Eschweiler,* 158 Wis. 25, 147 N. W. 1008; *Parkes v. Lindenmann,* 161 Wis. 101, 151 N. W. 787.

In the return of the circuit court to the writ by *Hon. W. J. Turner* it is said:

"The motion made by the plaintiff which resulted in the order of January 20, 1916, presented facts by reference to the record in the action and affidavits showing negotiations, propositions, and agreements between the attorneys for the plaintiff and Clifton Williams, Esq., assistant city attorney for the city of *Milwaukee,* who was charged with the defense of the said action, which satisfied the court that the attorneys for the plaintiff believed, and had good reason to believe, and to act upon such belief, that the defendant was not relying upon sec. 3072 of the Revised Statutes, but that if such negotiations as were had and pending did not result in a settlement of the action, that the action would be brought to trial without reference to the expiration of the year, having in mind the convenience of the attorneys, and for that reason we held that the defendant was estopped and waived the right to avail itself of the provisions of said sec. 3072 of the Statutes of Wisconsin."

While the evidence produced in the circuit court on motion to dismiss and upon which the circuit court acted is rather meager, we think it was sufficient to warrant the court in

holding as it did, and that its ruling should not be disturbed here. We see no useful purpose in extending this opinion by a discussion of the affidavits produced and upon which the circuit court made its ruling as appears from the returns to the writ.

By the Court.—The demurrer to the returns is overruled and the relation dismissed.

CANNING, Respondent, vs. CHICAGO & MILWAUKEE ELECTRIC RAILWAY COMPANY, Appellant.

March 15—June 13, 1916.

Street railways: Negligence: Collision with vehicle: Special verdict: Sufficiency: Instructions to jury: Positive and negative testimony: Contributory negligence: Questions for jury: Witnesses: Competency: Physicians and surgeons: Appeal: Harmless error.

1. Plaintiff drove out of an alley and started to cross a street from east to west in the middle of a block but, seeing one of defendant's street cars coming south on the west track, stopped his team so that the horses stood partly over the east track. The car stopped about forty feet north of him and he started his horses again, but the car also started and struck his wagon and injured him. The jury found that the motorman was not guilty of gross negligence in the operation of his car; that he could by the exercise of ordinary care have seen the plaintiff in time to have avoided the collision; and that such want of ordinary care was the proximate cause of plaintiff's injuries. *Held*, that negligence of the defendant was sufficiently found.
2. Several witnesses having testified that they saw plaintiff stop, others that they did not observe him stop, an instruction as to the relative weight of positive and negative testimony was properly given.
3. The stopping of the car as stated might well be taken by plaintiff as an invitation to cross first even though the car had the right of way, and it cannot be said as matter of law that he was guilty of contributory negligence in attempting to cross ahead of the car.

4. Plaintiff having testified that he told the physician whom he consulted that he was unable to retain his urine, it was error to exclude testimony of the physician that plaintiff did not tell him so; but the error should not in this case work a reversal, there being other evidence which quite satisfactorily showed severe injury.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

Action begun in the civil court to recover damages for personal injuries. About 5 o'clock in the afternoon of February 13, 1914, plaintiff was injured by being struck by one of defendant's street cars while crossing Fifth street between Grand avenue and Wells street. Plaintiff was driving a two-horse express wagon. He stopped at Skiles bakery in the alley between Grand avenue and Wells street to load some bread boxes. He then drove out of the alley from the east and started to cross Fifth street to enter the alley on the west side of the street. When he was about on a line with the sidewalk, as he sat on the seat of the wagon he looked north and south to see if any cars were approaching. There is evidence to the effect that he saw a car to the north coming south on the west track and stopped his team so that the horses stood partly over the east track; that as the car came to a dead stop about forty or forty-five feet north of the alley he concluded that the motorman intended to let him across and started his team. The pavement was icy and he urged his horses rather sharply, as they could get better footing if going a little fast. The motorman started the car just after plaintiff started his horses and failed to give any warning. When plaintiff became aware that the car was approaching he was too far over the track to back off and therefore he tried to urge his team across ahead of the car. He failed to do this, and the car struck the wagon about the middle and threw plaintiff against the front of the car.

The jury found: (1) That plaintiff was injured at the time and place alleged; (2) that the car stopped after it left Wells

street and before it struck the wagon; (3) that the team stopped after it emerged from behind Skiles bakery and before the collision took place; (4) that the motorman was not guilty of gross negligence in the operation of his car; (5) that the motorman could by the exercise of ordinary care have seen the plaintiff in time to have avoided the collision; (6) that such want of ordinary care was the proximate cause of plaintiff's injuries; (7) that the plaintiff could not by the exercise of ordinary care have seen or heard the approaching car in time to have avoided the collision; (8) that plaintiff was not guilty of any want of ordinary care which proximately contributed to his injuries; and (10) damages $1,898. From a judgment for plaintiff entered upon the special verdict the defendant appealed to the circuit court. The circuit court affirmed the judgment of the civil court, and from a judgment entered accordingly the defendant appealed to this court.

For the appellant there was a brief by *Edgar L. Wood,* attorney, and *Bull & Johnson,* of counsel, and oral argument by *Mr. Wood.*

For the respondent there was a brief by *Glicksman, Gold & Corrigan,* and oral argument by *W. D. Corrigan.*

The following opinion was filed April 11, 1916:

VINJE, J. Error is assigned because the special verdict did not properly submit the issue of defendant's negligence to the jury. The fifth question covers that issue properly and is in form substantially as proposed by the defendant. It finds a want of ordinary care on the part of the motorman under the circumstances shown by the evidence. It is a verity that the car ran into the plaintiff. By negativing gross negligence the jury found that the motorman did not wilfully run into him. The collision, therefore, occurred through inadvertence on the part of the motorman. This inadvertence the jury finds to be his failure to observe plaintiff in time to

avoid the collision, evidently relating to a time after he stopped as found by the jury; and the jury find such failure to observe was due to a want of ordinary care, for had he exercised such care he could have stopped the car in time to avoid a collision. The findings taken together amount to a finding that the collision occurred through a want of ordinary care on the part of the motorman. Such finding is sustained by the evidence. This want of ordinary care is found to be the proximate cause of plaintiff's injury. Hence the negligence of defendant is sufficiently found.

The court gave an instruction as to the relative weight of positive and negative testimony. In view of the answers given by the jury this became material only as it bore on question 7, relating to plaintiff's contributory negligence, and only in respect to whether or not plaintiff stopped as the jury found he did. Several witnesses testified that they saw him stop, others that they did not observe him stop. In such state of the evidence the instruction was proper.

It cannot be said as a matter of law that plaintiff was guilty of contributory negligence in attempting to cross ahead of the car. The stopping of the car in the middle of the block and about forty feet away from him might well be taken by him as an invitation to cross first, even if the car did have the right of way. His conduct was properly left to the jury to characterize as negligent or not.

Plaintiff after the accident consulted Dr. J. E. Purtell, who treated him for some time. Upon direct examination plaintiff, in testifying about the result of his injuries, said among other things that he was unable to retain his urine and that when he visited Dr. Purtell about the 18th of May he told the doctor about it, that is, about his inability to retain his urine. Defendant put Dr. Purtell on the stand for the purpose of denying that plaintiff on the 18th of May or at any other time told him so. The evidence was excluded on the ground that under sec. 4075, Stats. 1915, the doctor was dis-

qualified to testify as to what plaintiff told him. The exclusion of such evidence was error. Plaintiff opened the door for it on his direct examination when he stated what he told the doctor. Had he not done so, of course the doctor could not have testified on the subject against plaintiff's objection. In view, however, of other evidence which the jury was warranted in believing and which quite satisfactorily shows severe injury, we have reached the conclusion that the error does not demand a reversal of the judgment.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $25 costs, on June 13, 1916.

WILL OF ALLIS.

March 17—June 13, 1916.

Wills: Construction: Interest of grandchildren in estate: Validity: Perpetuities: Executors and trustees: Final discharge: Guardian ad litem *of infants: Allowances.*

1. In construing a will a gift to a grandchild cannot be implied from a gift to a daughter, defeasible if the daughter dies without children surviving.
2. Paragraph 6 of a will gave property to trustees "to be held for the use, or assignment, of my wife during life, and after her death for a joint summer residence of my children and their families, as they may agree among themselves—particularly those residing in Milwaukee. . . . If at any time it shall be the joint wish of my wife and children residing in Milwaukee, or said children after her death, to have the property sold, it may be sold and the proceeds go into my estate fund." The "estate fund" was a part of a business trust created by the will, and the business and the fund were to remain and be conducted as directed in the will during the minority of the children and the life of the widow. The provisions in respect thereto rather exclude than support the idea that there was any gift out of that fund to the grandchildren. *Held*, that paragraph 6 did not give any interest in the summer residence to grandchildren.

3. Although some of the provisions in the will evince a purpose to keep the property in the family of the testator, to prevent it from going to strangers to his blood, yet, the testator having made no limitation over to his grandchildren, none can be made, and the grandchildren took under the will no right, title, or interest in the estate.
4. Whether or not the will was void because the scheme thereof involved an unlawful suspension of the absolute power of alienation, is not decided.
5. Assuming the will to be valid, final settlement of the estate and discharge of the executors and trustees was properly adjudged, it appearing that they had executed their trust as fully as the scheme of the will was capable of execution and to the satisfaction of the persons interested, all of whom participated in and assented to the various transactions and the administration of the estate resulting in the order of distribution and discharge.
6. If, on the other hand, the will be deemed void, the same result follows, the entire estate having been distributed to the widow and heirs at law of the testator in accordance with an agreement made by them.
7. Under sec. 4041*b*, Stats., the supreme court has power to make a proper allowance for services and disbursements in that court of the guardian *ad litem* for infants who are necessary parties to a proceeding in the settlement of an estate; but any allowance for his services and disbursements in the county and circuit courts should be adjusted and made by those courts.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

Edward P. Allis died a resident of the city of Milwaukee, Milwaukee county, Wisconsin, on the 1st day of April, 1889. Deceased left his holographic will dated March 30, 1888. His will was proven and admitted to probate in the county court of Milwaukee county May 7, 1889, and letters testamentary thereon were issued to Margaret W. Allis, widow of said deceased, *William W. Allis, Edward P. Allis, Jr., Charles Allis,* and Edwin Reynolds, now deceased, executors named in said will. Edwin Reynolds died February 19, 1909. *William W. Allis, Edward P. Allis, Jr.,* and *Charles Allis* are the sole surviving executors and trustees under said will.

Edward P. Allis, deceased, left him surviving his widow, Margaret W. Allis, his sons, *William W. Allis, Edward P. Allis, Jr., Charles Allis, Jere Allis,* Ernst Allis, *Frank W. Allis, Louis Allis,* and *Gilbert Allis,* and his daughters, *Maude Allis Conway, Mary Allis Keeling,* and *Margaret Allis Norris,* his only heirs at law. Margaret W. Allis, widow, died testate at the city of Milwaukee December 20, 1909. Her last will and testament was proven and admitted to probate in the county court of Milwaukee county and letters of administration with the will annexed were issued to *Richard H. Norris* of Milwaukee, Wisconsin, who qualified and acted as such administrator with the will annexed.

Ernst Allis, son of Edward P. Allis, died November 9, 1894, leaving him surviving *Penelope Winston Allis,* his widow, and *Margaret W. Allis* (now *Harrison*), his daughter, his only heirs at law. His last will and testament was admitted to probate in the county court of Milwaukee county and letters testamentary issued thereon to Milwaukee Trust Company, now *First Savings & Trust Company,* and *John W. Barr, Jr.,* who qualified and are the acting executors.

All the surviving heirs at law of said Edward P. Allis, deceased, are of full age and free from any disability which would prevent them from appearing in court and protecting their rights.

Edward P. Allis III, son of *Louis Allis,* aforesaid, *John Henry Keeling, Jr.,* son of the daughter *Mary Allis Keeling, Richard H. Norris, Jr., William A. Norris, Margaret A. Norris, Thomas W. Norris,* and *Frank W. Norris,* children of the daughter *Margaret Allis Norris,* aforesaid, *Maude Allis* and *William P. Allis,* children of the son *Edward P. Allis, Jr.,* aforesaid, and *Gilbert Allis, Jr.,* and *Amber Allis,* children of the son *Gilbert Allis,* aforesaid, are all under age and represented by guardian *ad litem* in this matter.

The surviving executors of and trustees under the last will and testament of Edward P. Allis, deceased, petitioned the

county court of Milwaukee county in March, 1913, praying that the estate of said deceased might be adjudged fully settled and they be discharged as such executors and trustees.

On February 10, 1914, the county court of Milwaukee county found and adjudged that the will of said Edward P. Allis, deceased, was valid and that the grandchildren of said testator took no interest in said estate thereunder; that the executors had executed their trust as fully as the scheme was capable of execution and disposed of the property pursuant to the terms of the trust and to the satisfaction of all parties interested, and that said surviving executors and trustees be discharged from all their duties and obligations as such executors and trustees.

Upon appeal from this judgment to the circuit court the circuit court found the will invalid, but construed it assuming its validity, and found and concluded that, assuming said will to be valid, the grandchildren of the testator took no right, title, or interest thereunder in or to any of the estate left by said testator or in or to the rents or profits thereof; that, assuming the will to be valid, the executors and trustees fully administered and distributed the estate in accordance with the terms of the will; and that such executors and trustees were entitled to their final discharge as prayed in the petition. The circuit court further found that the will was wholly void and that said Edward P. Allis died intestate, and that his property has been distributed between his widow and heirs at law in accordance with their agreement. The court further found and adjudged that the decree of the county court of Milwaukee county declaring the said estate finally settled and distributed and discharging the surviving executors and trustees from further liability be affirmed. From this judgment of the circuit court the grandchildren of Edward P. Allis, deceased, by their guardian *ad litem,* appealed to this court.

Christian Doerfler, guardian *ad litem,* for the appellants.

For the respondents there was a brief by *Geo. D. Van Dyke*

and *Thomas M. Kearney* (in which *Geo. P. Miller* and *Jackson B. Kemper,* attorneys for certain respondents, also joined); and the cause was argued orally by *Mr. Kearney, Mr. Van Dyke, Mr. Arthur W. Fairchild,* and *Mr. Kemper.*

The following opinion was filed April 11, 1916:

Kerwin, J. Edward P. Allis, at the time of his death, conducted and operated large machine shops and foundries consisting of what is known as Reliance Works, covering about three blocks, the Bay State Works, covering about one block, the South Foundry, covering about ten acres, and certain dock property on the south side, all in the city of Milwaukee, Wisconsin.

The real estate, tools, and machinery were carried on the testator's books at the time of his death at about $1,000,000. The business was operated by the deceased and his sons *William W., Edward P., Jr.,* and *Charles Allis,* who constituted the executive operating force. The three sons mentioned were connected with the father's business for a period of about twenty years prior to his death. *Louis Allis* was connected with the business for a period of about six months prior to the testator's death, but none of the other boys had been connected with the business before that time.

At the time of the death of the testator the business had a working capital of $550,000 and an outstanding indebtedness of about $415,000, so that the net working capital of the business at the time of the death of the testator was about $136,000. The indebtedness outside of the business was estimated somewhere about $490,000. After the panic of 1873 the testator became insolvent and compromised with his creditors. After the testator's death it was found difficult to carry on the business on account of lack of credit on the part of the estate. Under the provisions of the will the executors and trustees were required to execute a mortgage upon the plant in the sum of $250,000 for the benefit of the so-called daughters' fund

provided for in the fourth provision of the will. This mortgage was not recorded because of the financial condition existing. The son *Charles* raised money upon his individual life insurance in order to help along the business. It appeared to the executors and trustees under the will shortly after the death of the testator that the business of deceased was in such shape that it was doubtful whether the same could be continued successfully, and if not it would be necessary to go into liquidation, in which event little would be realized for those interested in the estate. A large part of the value of the business consisted in the fact that it was a going concern. The testator was engaged in building large engine units and his field of operation covered the world. The least amount of capital necessary to carry on the business successfully was thought to be $1,000,000.

In addition to the property in the business there was also property owned by the testator outside of the business, namely, the summer home, Lakeside, situate at Pewaukee Lake, a farm known as "Reliance Stock Farm," located at Isinours, Fillmore county, Minnesota, 68,000 acres of land in Michigan, and his life insurance.

In view of the situation existing at the time of the death of the testator the executors under the will conferred with General Winkler, legal adviser of the deceased during his lifetime, for the purpose of ascertaining the best methods to be pursued to avoid impending difficulties. The result of this conference was the perfection of a plan by which it was understood that the property of the testator might be preserved and the terms of the will, whether valid or not, be given substantial effect, in pursuance of which on February 10, 1890, all interested in the estate, except the son *Jere,* who had prior to that time disposed of his interest to his mother, made, executed, and delivered an agreement in writing relating to the property belonging to the estate. At the time this agreement was entered into all the children of the testator were of age

except *Margaret* and *Gilbert Allis.* This agreement provided that the property referred to in the fourth paragraph of the will be granted to the executors and trustees to hold for the sole use and benefit of the widow, Margaret W. Allis, during her lifetime, and upon her death to be conveyed with the accumulation thereof to the three daughters in such proportion as the widow might designate by her will, and in the event of the widow dying intestate then to said daughters in equal shares. It was further provided in said agreement that a corporation be organized under the laws of Wisconsin to be named the Edward P. Allis Company, with a capital stock of $1,500,000, and that all the property of the deceased and of the estate of Edward P. Allis, deceased, except the property heretofore mentioned and described in the fourth paragraph of the will, and certain other described properties, be conveyed to said corporation, the Edward P. Allis Company. This contract provided in detail for the assumption and payment of indebtedness and certain other obligations and provided generally for the management and carrying on of the business of said deceased in harmony with the provisions of the will and in the manner thought for the best interest of all parties concerned.

On June 23, 1892, on account of dissatisfaction expressed by the widow and some of the children of deceased, a new agreement was made by the terms of which certain additional provisions were made for the widow, and this agreement was signed by *Margaret* and *Gilbert Allis,* children who had become of age since the signing of the prior agreement. From the time of making this agreement and until 1900 the business of Edward P. Allis Company was successfully conducted by the executors and trustees on a large scale. Afterwards on account of large business combinations, it was thought advisable to sell out to or make some combination with the Allis-Chalmers Company and a deal was carried out which resulted in a sale of the interests of the Edward P. Allis Company to

the Allis-Chalmers Company. The agreement respecting the sale to the Allis-Chalmers Company was participated in by all the stockholders of the Edward P. Allis Company and a resolution was adopted authorizing the sale, and the terms of the resolution were carried out and the respective parties entered upon the execution of such agreement pursuant thereto and received out of the proceeds derived from such sale their respective proportionate shares of the preferred stock in the Allis-Chalmers Company.

During the various transactions from the time of the death of Edward P. Allis up to the time of final division of the stock received upon the sale of the Edward P. Allis Company the interests of the grandchildren of Edward P. Allis were in nowise considered, and obviously from the dealings and transactions it was not thought that they had any interest.

It is quite clear from the record that if the grandchildren have no interest, even assuming the will to be valid, then the judgment of the court below must be affirmed, because it appears that all other parties interested participated in and assented to the various transactions and the administration of the estate resulting in the order of distribution and discharge which is appealed from here.

The appellants complain of the conclusions of the court below, which are as follows:

(1) That the will of Edward P. Allis was wholly void and that said Allis died intestate and his entire property has been distributed between the widow and heirs at law in accordance with their agreement of February 10, 1890, and modifications thereof, and that said executors and trustees are entitled to their final discharge as prayed for in their petition.

(2) That the will suspends the absolute power of alienation, contrary to secs. 2039, 2061, 2062, 2085, sub. 5, and 2091, Stats.

(3) That every portion of the will found to be invalid is a material part thereof, the validity of which dislocates the en-

tire testamentary scheme of the testator and without which it cannot be presumed he intended the other parts of his will to stand valid, and that by reason of the invalidity of each of said parts the entire will fails.

(4) That the order or decree of the county court of Milwaukee county declaring the estate of Edward P. Allis finally settled and distributed and discharging the petitioners as surviving executors and trustees from all further liability or duty in respect thereof should be affirmed.

(5) Assuming the will of said testator to be valid, his grandchildren took no right, title, or interest thereunder in the estate left by said testator, or rents, issues, income, or profit thereof.

(6) Assuming the will to be valid, the executors and trustees and those interested in the estate of said testator had the right under said will to dispose of the property outside of the business, including the property mentioned in the fourth paragraph of the will, in accordance with the agreement of February 10, 1890, as modified, and that the order or decree of the county court discharging the executors and trustees in respect thereof remaining unmodified, unappealed, and unreversed, estops all parties to these proceedings from setting up any claim thereto except under said order or decree.

The important question on this appeal is whether the grandchildren of the testator, Edward P. Allis, have any interest in his estate, assuming his will to be valid. If not, then no other question discussed need be considered.

It is strenuously contended by the learned counsel for the grandchildren, who is acting as guardian *ad litem,* that from the four corners of the will it appears that the scheme of the testator was that his estate should remain in the family, and that the grandchildren took an interest in it. It is said that an examination of the whole will shows that it was the intention of the testator to preserve and conserve the estate for the benefit primarily of his family and his descendants. The

first and second paragraphs of the will provide for continuing the business. The third provides that during the life of the wife of the testator and minority of the children all needed money to maintain the home of testator's wife and defray her expenses and the expenses of the minor, unmarried, or unsettled children in the same manner as was the custom of the testator during his life be furnished. The fourth paragraph of the will gives to the testator's trustees the homestead property and personal property in and about the homestead, including furniture, pictures, plate, books, etc., of the value of $200,000, and the sum of $250,000 to be secured by first mortgage on the business property, to be held apart from the business for the safety of testator's wife and minor and unsettled children and the ultimate benefit, in the discretion of the wife, if living, of his three daughters, *Maud Allis, Mary W. Allis,* and *Margie Allis.* This fourth paragraph further provides for what is designated as the daughters' fund for the benefit of the widow and daughters.

Counsel insists that from the whole will it seems that the testator intended to conserve the estate for the benefit, primarily, of his family and his descendants, and refers to the following in paragraph 6:

"I hereby give and bequeath to my said trustees, to be held for the use, or assignment, of my wife during life, and after her death for a joint summer residence of my children and their families, as they may agree among themselves—particularly those residing in Milwaukee—my Lakeside property, consisting of three separate pieces of ground, with cottage, boat house, furniture, boats, etc. . . . If at any time it shall be the joint wish of my wife and children residing in Milwaukee, or said children after her death, to have the property sold, it may be sold and the proceeds go into my estate fund."

Counsel insists that an analysis of the foregoing provision shows that it creates a life estate in the widow, after her death a life estate in the children residing in Milwaukee, and upon the death of the children the property vests in their children,

if any they have, and if they should die without children the interest of such child passes into the estate fund, and that the grandchildren in such case would take a contingent remainder subject to the right being defeated.

Counsel dwells upon the thirteenth paragraph of the will as showing a gift to grandchildren and contends that language providing that in the event of a child dying childless, or his child not reaching majority, the portion of such child shall revert to the estate, and the provision that the amount set over to children connected with business shall not be drawn out, show the intent of the testator that the estate should remain in the family or blood relations. Other paragraphs of the will are referred to by counsel for appellants as tending to show that it was the intention of the testator that the property should remain in the family and not pass to others not of their blood.

But while it is true that the will abounds in expressions showing an intention to keep the estate in the family of the testator, and while there are express devises and bequests to the widow and to children of the testator, there is no direct devise or bequest to a grandchild.

It is insisted by respondents that grandchildren by daughters are estopped by the decree of the county court from claiming any interest under the will, and further that they in fact took no interest. We shall not pass on the question of estoppel, although there is strong ground for this claim, because we are convinced that none of the grandchildren took any interest under the fourth paragraph of the will.

The gift to the daughters under the fourth paragraph of the will is defeasible on condition subsequent and in no event vests in the grandchildren. If a daughter had a child who attained majority living the daughter, the gift vests in the daughter absolutely. There is no express gift over to grandchildren on the termination of the estate in a daughter.

A gift to a grandchild cannot be implied from a gift to a daughter, defeasible if the daughter dies without children

surviving. *Anderson v. United R. Co.* 79 Ohio St. 23, 86 N. E. 644, 51 L. R. A. N. S. 477, at p. 481, and note p. 485; approved in *Messenger v. Anderson,* 225 U. S. 436, 32 Sup. Ct. 739; *Baker v. Estate of McLeod,* 79 Wis. 534, 48 N. W. 657; *Burnham v. Burnham,* 79 Wis. 557, 48 N. W. 661.

Nor do we find any gift to grandchildren under any other paragraph of the will. The stock farm was given to the son *Jere,* "Lakeside" was given for a joint summer residence, but if sold the proceeds to go into the estate fund; interest in Daisy Roller Mills, part of estate fund, and Michigan lands to be divided among testator's children as deemed best by his wife. All the remainder of testator's property may be classed as property invested in the business. The so-called estate fund may also be regarded as part of the business trust.

Paragraph 2 of the will provides:

"I desire and direct that the business essentially as now organized and conducted shall be conducted uninterruptedly and indefinitely under a charter . . . My individual account on the books of the business shall be transferred to the account of 'Edw. P. Allis Estate,' and there shall go to its credit the entire profits and accumulations of the business and also the income and proceeds of all sales of any property hereby given to said trustees and not immediately connected with the business, the same as all such things have heretofore gone to my individual account."

The provisions in the will respecting the estate fund show that it was a part of the business trust created by the will and was by the terms of the will to remain during the minority of the children and the life of testator's wife, and rather exclude than support the idea that there was any gift out of this fund to the grandchildren. The will provides:

"3. I desire and direct that my business and my estate fund or account shall remain and be conducted as above during the minority of my children and during the life of my wife." . . .

"13. Upon the death of my wife and the majority of all my children, if at that time the character and occupation of them all is reasonably established, and if not, when such char-

acter and occupation shall be settled and provided for, I direct that the final division to the children actually engaged in or connected with the business of Edw. P. Allis & Co. be made upon the following basis: . . ."

The will also provides for sale and termination of the business and division if in the unanimous opinion of those interested the business has become unprofitable. The division referred to manifestly means a division of the proceeds among those interested.

True, there are provisions in the will to the effect that the business be "continued uninterruptedly and indefinitely under a charter," but such provision must be construed in the light of other provisions of the will.

Paragraph 13, above quoted, particularly provides for final division, but makes no provision for grandchildren, and the final division provided vests the title in the parties in interest unless divested by some provision of the will, and then it would go into the estate fund and not pass to grandchildren.

There are questions raised by counsel for respondents respecting validity of inconsistent provisions in the will, defeasance clauses, and limitation which are claimed to be void as repugnant to the grant, and a long line of authorities are cited in support of the position taken by counsel. We do not, however, find it necessary to discuss these authorities.

It is true that some of the provisions in the will evince a purpose to keep the property in the family of the testator, to prevent it from going to strangers to his blood. We therefore look in the will to find some limitation over to grandchildren, but we find none, and the testator having made no limitation over to grandchildren we can make none. *Danforth v. Oshkosh,* 119 Wis. 262, 97 N. W. 258; *Parsons v. Winslow,* 6 Mass. 169; *Wool v. Fleetwood,* 136 N. C. 460, 48 S. E. 785. No other questions need be considered.

By the Court.—The judgment appealed from is affirmed.

The following opinion was filed June 13, 1916:

KERWIN, J. A motion was made in this court in the nature of a motion for rehearing, asking the court to change the mandate by making an allowance to the guardian *ad litem* for costs, disbursements, and fees. It is set out that $370.49 is disbursements, all of which was expended in this court except $33.25; that the total time consumed on appeal to the supreme court was two days at Madison, one day awaiting trial and the other in argument; that the time expended in getting out bill of exceptions, preparing record and briefs, and consideration of the case for this court was twenty-eight days. Claim is also made for services and disbursements in the county and circuit courts. We shall only consider the allowance in this court. Any allowance for services and disbursements in the county and circuit courts must be adjusted and allowed by such courts. This court has power under sec. 4041*b*, Stats., to make proper allowance to the guardian *ad litem* for services and disbursements in this court. We think $500 a reasonable allowance for services and $337.24 for disbursements, making in all $837.24.

By the Court.—It is ordered that $837.24 be and the same is allowed Christian Doerfler, guardian *ad litem,* for services and disbursements in this court, and the mandate is amended accordingly. No costs are allowed on this motion.

WILL OF LYNCH: SHELTON, Appellant, vs. LYNCH, Respondent.

March 17—June 13, 1916.

Wills: Undue influence: Trial: Findings of fact: Executors: Proponent of will: Costs.

1. **A finding of the circuit court that a will was procured to be executed by undue influence of a daughter with whom the testatrix was living is, upon the evidence, *held* not to be so clearly erroneous that it can be disturbed by this court.**
2. **Where, the only issue in a case being as to whether a will was procured by undue influence, forty-one findings of fact were filed, consisting mainly of a synopsis of evidence and including a wholly unsupported finding of mental incapacity, such practice is condemned.**
3. **Nothing in sec. 2932 or sec. 4041*b*, Stats., authorizes the taxing of attorney's fees in the circuit court against the unsuccessful proponent of a will who, although the will named her executrix and was admitted to probate in the county court, did not qualify as executrix but acted throughout in her individual capacity.**

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed in part; reversed in part.*

Proceedings to probate a will. Ellen Lynch died in Milwaukee March 15, 1913, at the age of eighty-four, leaving a will executed June 26, 1912, in which her daughter, *Julia Shelton,* was named as executrix. The will left $1,000 to William Lynch, a son; $500 in trust to *Julia Shelton* for John Lynch, another son; $1,000 to *Julia Shelton,* who was also made residuary legatee. Whether the testatrix had any estate depends upon whether she or her son *Edward,* the contestant, was the owner of a bank deposit amounting to about $3,900. The will was admitted to probate in the county court; but upon an appeal taken by *Edward Lynch* the circuit court reversed the judgment of the county court, and refused the probate of the will on the ground that it was procured to

be executed by the fraud, duress, and undue influence of *Julia Shelton,* and awarded attorney's fees against her in the sum of $250. From a judgment entered accordingly she appealed.

For the appellant there was a brief by *Arthur Breslauer* and *N. L. Baker & W. J. Zimmers,* and oral argument by *Mr. Baker.*

For the respondent there was a brief by *Kronshage, McGovern & Hannan,* and oral argument by *Timothy J. Hannan.*

The following opinion was filed April 11, 1916:

VINJE, J. No attempt to give even a synopsis of the evidence will be made. The salient features of it tending to support the judgment of the circuit court are these: Ellen Lynch and her son *Edward* had lived together for about twenty-five years immediately preceding January, 1912. During the latter part of that time he had earned as much as $100 per month, and what was not used for household and other expenses by them was deposited in a bank, part of the time in the name of Ellen Lynch, part of the time in her name and that of her sons *Edward* and William, and part of the time in her and *Edward's* name. Shortly before she made her will *Edward* withdrew the bank account, claiming it was his and that he wanted to use it as he was about to be married. In January, 1912, Ellen Lynch broke her hip and she was removed to St. Mary's Hospital, where she remained till June 12, 1912, when she was removed to the house of her daughter, *Julia Shelton,* with whom she continued to live up to the time of her death, March 15, 1913. There is considerable evidence to the effect that Mrs. Lynch up to the time she went to the hospital thought a great deal of her son *Edward;* that *Julia Shelton* refused to let him see his mother while she remained with her; that *Mrs. Shelton* sent for an attorney to draw the will and that she was also instrumental in causing her mother to institute an action for the recovery

of the money in the bank drawn out by *Edward.* On the other hand there is evidence tending to prove that Mrs. Lynch became enraged at her son *Edward* on account of his drawing out of the money in the bank which she claimed belonged to her and for that reason she left him out of her will; that the will was the result of her free, deliberate choice and that no undue influence of any kind was exerted upon her by *Julia Shelton* or any one else. The state of the evidence is such that we cannot say the circuit court clearly erred in finding undue influence, hence such finding must stand as a verity in the case.

It appears that at the close of the trial on June 29, 1915, the court filed a memorandum reading: "Will disallowed on the ground of undue and fraudulent influence upon the testator. Objections of *Edward V. Lynch* sustained. Oral directions will be given for the direction of findings. J. C. LUDWIG, Judge."

On October 28, 1915, forty-one findings of fact were filed covering eleven printed pages of the case and including a finding that the testatrix had not the mental capacity to execute a will. There is absolutely no evidence to sustain such a finding. On the contrary, all the evidence shows the testatrix was of sound mind, and, except for the hip broken in January, in good health for a person of her age. There was only one issue in the case and that was whether or not the will was procured by undue influence. A finding covering that issue is all the statute and good practice required. Instead of that we have forty-one findings, consisting in the main of a synopsis of the evidence favorable to the contestant. Such practice deserves condemnation. The situation would lend color to the surmise that the findings were drawn by contestant's attorneys and not closely enough scanned by the judge at the time of signing, for we cannot believe that he intended to find lack of testamentary capacity, yet the assertion of that fact is included in both the findings of fact and conclusions of law.

The court also adjudged that *Mrs. Shelton* personally pay the sum of $250 attorney's fees to the contestant. Sec. 2932, Stats., authorizes the imposition of an attorney's fee against an executor in an action prosecuted or defended by him when satisfied that the prosecution or defense is in bad faith or for mismanagement. Sec. 4041*b* authorizes the payment of an attorney's fee out of the estate in will contest cases, but not by the proponent or contestant personally. Our attention has not been called to any other statutory provisions permitting attorney's fees to be taxed against an unsuccessful proponent of a will, and since we find nothing in the record to show that *Mrs. Shelton* prosecuted as executrix the court erred in imposing attorney's fees against her. It is true the will named her as executrix and that it was admitted to probate by the county court. But the will did not waive the giving of a bond by the executrix and we cannot find one was given, so we must conclude, as the entitling of the papers also shows, that *Mrs. Shelton* prosecuted in her individual capacity and not as executrix.

By the Court.—That part of the judgment reversing the judgment of the county court and refusing probate of the will is affirmed; that part of the judgment awarding an attorney's fee of $250 against *Julia Shelton* is reversed. The appellant will recover costs in this court.

A motion for a rehearing was denied, with $25 costs, on June 13, 1916.

UNION BANK OF MILWAUKEE, Respondent, vs. COMMERCIAL SECURITIES COMPANY and another, imp., Appellants.

March 18—June 13, 1916.

Bills and notes: Indorsers: Parol evidence as to liability: Discharge by use of collaterals for other purposes: Estoppel: Promise of indorsers to pay: Consideration: Reliance thereon: Special verdict: Omitted facts: Appeal: Harmless errors.

1. In the absence of fraud, parol evidence as to what occurred between the parties before or at the time of the giving of promissory notes is not admissible to show that those whose names appear thereon as indorsers were in fact to be liable thereon as makers.
2. One who places his name on the back of a note before delivery to give credit thereto is not liable as a maker, but only as an indorser, even though he was not a party to the note prior to his so writing his name.
3. If a person acts in his business relations with another under such circumstances as to charge him with knowledge that such other may probably rely thereon to his damage in case of such person's conduct thereafter being inconsistent with his former actions, and such other does in good faith so rely, such person cannot so change his position to such other's prejudice.
4. In an action by a bank against the indorsers of promissory notes for which certain collaterals held by the bank for other notes of the same maker were secondarily security, the jury having found upon sufficient evidence that at and prior to the time of waiving protest on the notes in suit defendants promised to pay them, that after maturity of the notes in suit defendants advised and aided the transfer by the bank of said collaterals, with the notes primarily secured thereby, to another person, and that with full knowledge of such transfer they again promised to pay the notes in suit; and it being apparent from the evidence that the bank in good faith relied on such promises in parting with the collateral and in dealing with the maker of the notes, defendants are estopped from asserting they were relieved from liability as indorsers on the ground that the bank had applied the collaterals to other purposes.
5. It is not material in such case that there was no consideration moving to the indorsers for their promise to pay the notes, if such promise was made to induce the plaintiff bank to look to them and not to the collaterals or other means it might have for

satisfaction of the debt in whole or in part, and the bank relied and acted thereon.

6. No question having been submitted to the jury as to plaintiff's reliance upon the defendants' promises, and no request made for such submission, that question must, under sec. 2858*m*, Stats., be deemed to have been determined by the trial court in conformity with its judgment.

7. Errors committed in the course of the trial are not sufficient ground for reversing a judgment unless it pretty clearly appears that the result might probably have been more favorable to the party complaining if they had not occurred; and, in the light of the presumption that the trial was before a competent judge and an impartial and intelligent jury, there is generally little use in bringing to the attention of this court many detail matters in respect to the admission of evidence, where such matters must be considered in connection with a mass of evidence and many circumstances.

8. The jury found that the agreement pursuant to which the said collaterals and about $20,000 of notes, given by the maker of the notes in suit and primarily secured by said collaterals, were transferred to one N., who was interested in protecting the credit of said maker, was made by N. in consideration of a promise by the bank to discount his notes, or those of companies controlled by him, to the amount of $60,000; also that such loan of $60,000 was not to become effective until approved by the directors of the bank. It appeared that such approval was to depend upon the directors being satisfied of the truth of representations made by N., which investigation proved to be untrue, but that the transaction as to the payment or purchase by N. of the $20,000 of notes and the transfer to him of the collaterals had been, in the meantime, completed and was not thereafter rescinded. *Held*, that the refusal of the bank to make the loan to N. did not affect the liability of the defendants upon their promise to pay the notes in suit.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

Action to recover on seven promissory notes, aggregating $6,000, and interest. The complaint contained appropriate allegations to charge defendants *Commercial Securities Company* and *C. R. Gether* as indorsers. The notes were dated May 1, 1913, payable four months after date, signed by the defendant Heller Piano Company, payable to the order of the

defendant *Securities Company* at the plaintiff bank, indorsed by such company and defendant *Gether,* and, for value, delivered to such bank. They were alike in form, and contained a provision for pledging collateral security for their payment in this form: "Having deposited with said bank as collateral security, for payment of this or any other direct or indirect liability or liabilities of us to said bank, due or to become due, or that may be hereafter contracted or existing, howsoever acquired by said bank, the following property," describing conditional sale contracts covering pianos, and followed by appropriate provisions for realizing on the collateral as necessary and application of the proceeds.

Defendants *Gether* and the *Securities Company* answered, separately, admitting the making and delivery of the notes as stated in the complaint, that they had not paid them, that the notes were possessed by plaintiff, and that they, in writing, waived protest for nonpayment and notice of protest, and pleading as defenses, that the notes were delivered to the plaintiff upon conditions which were not performed, and that the maker delivered to it collateral security for payment of the notes, and that it had, in due time, in its hands and under its control the means of complete or partial satisfaction of the indebtedness of the piano company upon the notes; but applied the same to other purposes than such payment.

The court permitted evidence claimed by plaintiff to show, or tend to show, that the loans evidenced by the notes were made to *Gether* and the *Securities Company,* and that they were primarily liable therefor; also that *Gether,* for himself and such company, when the waiver of protest was made, promised to pay the notes. There was also evidence to this effect: In September, 1913, the piano company was indebted to the bank to the amount of $20,000, and interest, in addition to the indebtedness on the notes in suit, and had collateral security therefor which was, secondarily, security for payment of the latter, and that the former indebtedness, with the

collateral thereto, was taken out of the bank by H. P. Nelson, he giving his check to the bank for $20,240.90. The check was made payable to the piano company. It was duly indorsed to the bank and thereupon the piano company notes, aggregating the amount of the check, and the collateral to such notes, were produced and turned over to Nelson. The check was paid. Nelson was interested in protecting the credit of the piano company and keeping it in business. There was a dispute in the evidence as to whether the transaction involved a purchase of the notes with the collateral or a payment of the notes. There was evidence tending to prove that *Gether,* on behalf of himself and the *Securities Company,* participated in such transaction and consented thereto, promising, during the negotiations, that they would take care of the notes in suit. There was further evidence to the effect that, as part of the transaction aforesaid, plaintiff agreed to discount or place notes of H. P. Nelson and companies controlled by him to the amount of $60,000, but upon condition that the matter should be approved by the board of directors of the bank after investigation as to the truth of representations made by him which were material to the value of the proposed paper; that upon such investigation being made, the representations were found to be materially untrue and so the bank declined to take or handle such paper; that the taking of such paper was so far independent of the delivery of the notes and collateral for the Nelson check of $20,240.90, and that the latter part was fully closed up without waiting for action as to the former and was not thereafter rescinded.

There was further evidence to the effect that the day after the notes in suit matured there was a credit, on the books of the bank, to the piano company, at the close of business for the day, of $1,313.71. At the opening of business the credit was $826.75. That was added to during the day by items aggregating over $6,000 and debited so as to leave the balance stated. There were debit and credit charges each business

day thereafter up to the close of the account, October 4, 1913, leaving, generally, a small balance in credit at the end of each day. There was a dispute as to whether the credit to the piano company, indicated by this account, was available for payment of the notes in suit. It was claimed by plaintiff that it was created by drafts which were credited up subject to be charged back if not paid and that they were dishonored; that such condition existed right along; drafts being taken by the bank, credited up, and the proceeds immediately checked out, which drafts were dishonored to such extent that there really was, counting out such drafts, an overdraft account all the time.

There was evidence that September 20, 1913, the plaintiff held certain real estate which had been transferred to it by Hugo Heller, that he, on that day, authorized plaintiff to sell the same for $3,000, and apply the money in payment of certain indebtedness of the Heller Piano Company other than that on the notes in question, and that such sale and application were made.

There was further evidence bearing on the subjects covered by the special verdict other than those heretofore referred to.

The jury found, in brief, as follows:

1st. Before the execution, indorsement, and delivery of the notes to plaintiff, it was agreed, between *Gether,* on behalf of himself and the *Securities Company,* and plaintiff, that the latter should make the loan to *Gether* and the *Securities Company.*

2d. The notes in suit were given and indorsed to carry out said agreement.

3d. When the waiver of protest was made, *Gether,* for himself and the *Securities Company,* agreed to pay the notes.

4th. *Gether,* knowing of the disposition of the securities held by the bank for the indebtedness of the piano company, and, after the maturity of the notes in suit, for himself and the *Securities Company,* promised to pay the same.

5th. *Gether,* knowing that the collateral parted with by the plaintiff in the transaction with Nelson was also collateral to the indebtedness in suit, advised and aided in such transaction.

6th. The value of the collateral so parted with did not exceed $15,000.

7th. The plaintiff, in September, 1913, did not apply to other purposes collateral security applicable to the notes in suit.

8th. The notes in suit were not delivered to Hugo Heller with knowledge of plaintiff's cashier that they were not to be delivered to the bank until after the collateral therewith had been approved by H. P. Nelson.

9th. The market value of the collateral to the notes in suit was $9,063 when deposited with plaintiff.

10th. The agreement to pay the $20,240.90 which was paid to plaintiff was in consideration of an agreement by plaintiff to discount notes of H. P. Nelson and the companies controlled by him, aggregating $60,000.

11th. It was understood that the loan of $60,000 was not to be made until approved by the board of directors of the plaintiff.

The defendants, *Gether* and the *Securities Company,* requested the court to submit to the jury, among others, questions as to whether, at the time the notes in suit became due, plaintiff had in its hands the means of complete or partial satisfaction of such notes which it applied to other purposes. Such questions were not submitted except so far as covered by the finding numbered 7. Appropriate motions were made on behalf of said defendants to save for review the matters presented on this appeal, which motions were denied and judgment was rendered in favor of plaintiff for the amount claimed in the complaint, with costs.

For the appellants there was a brief by *Glicksman, Gold & Corrigan,* attorneys for *C. R. Gether,* and *J. E. Tierney,* at-

torney for *Commercial Securities Company,* and a separate brief by *Jackson B. Kemper,* of counsel; and the cause was argued orally by *Mr. Kemper* and *Mr. W. L. Gold.*

For the respondent there was a brief by *Rubin, Fawcett & Dutcher,* attorneys, and *Paul R. Newcomb,* of counsel, and oral argument by *Mr. Francis E. McGovern* and *Mr. Newcomb.*

The following opinion was filed April 11, 1916:

MARSHALL, J. The first proposition submitted on behalf of appellants which, in an orderly treatment of the case, it seems should be considered, is that questions 1 and 2 of the special verdict should not have been submitted and the findings in respect thereto should not be deemed material, because it is not competent to vary a written contract by parol evidence of what occurred between the parties prior to or contemporaneous with its making, and the law in that respect applies to the contract relations between the payee of a note and one who places his name thereon, in form, as an indorser, no fraud being practiced in securing the indorsement. Such proposition is ruled in appellants' favor by *Charles v. Denis,* 42 Wis. 56; *Davy v. Kelley,* 66 Wis. 452, 29 N. W. 232; *Halbach v. Trester,* 102 Wis. 530, 78 N. W. 759; *Hackley Nat. Bank v. Barry,* 139 Wis. 96, 120 N. W. 275; and other cases decided by this court, all in harmony with a very elementary principle.

In *Hackley Nat. Bank v. Barry,* speaking of such principle, the court said:

"Our books are replete with statements and applications of that rule. . . . It has been applied in many instances to preclude admission of evidence of what was said between parties to commercial paper, at the time of the making thereof, to vary its terms: as that it might be paid in bank notes . . . ; or that a party purporting to be bound as a payee or indorser should not be so bound . . . ; or that the indorser placed his name on the note with the understanding that his indorsement

should be without recourse . . . ; and many more like instances."

In *Halbach v. Trester* it was said, in effect, that the engagement which the law implies from the circumstances of a person placing his name on the back of a note, in form, as an indorser, is just as immune from danger of being varied by parol evidence as any other written contract. "There being no claim of fraud in securing the indorsement, the trial court properly rejected the testimony by which it was sought to establish the fact that defendants did not intend to bind themselves as indorsers."

No reason is perceived why the foregoing does not preclude the findings of the jury that the agreement, pursuant to which the notes in suit were given, was that respondent should loan the money, therein promised to be paid, to appellants, from affording any efficient support to the judgment. There is no finding that any fraud was practiced upon them by respondent to secure their indorsements, and no evidence which would tend to support any such finding. On the contrary, the evidence, quite strongly, affirmatively indicates that the contract, as indicated by the writing, is precisely the one appellants intended to make; but there is no need for discussing the matter so we will not extend the opinion by referring in detail to the evidence.

Paulson v. Boyd, 137 Wis. 241, 118 N. W. 841, and similar cases, to the effect that parol evidence is admissible to show that a note was delivered to take effect only upon some stipulated condition, and *Breitengross v. Farr,* 100 Wis. 215, 75 N. W. 893, to the effect that such evidence is competent in an action between persons liable on a note to show the contract relations between them in relation to the matter, are in harmony with the foregoing.

It is suggested that, as appellants placed their names on the back of the notes before delivery to give credit thereto, they are liable as makers, particularly *Gether,* who was not a party

to the notes prior to his so writing his name. Such is the rule in some jurisdictions, as indicated in *E. L. Welch Co. v. Gillett,* 146 Wis. 61, 130 N. W. 879; but the weight of authority is to the contrary, and the decisions of this court are in harmony therewith. *Davis v. Barron,* 13 Wis. 227; *King v. Ritchie,* 18 Wis. 554; *Frederick v. Winans,* 51 Wis. 472, 8 N. W. 301; *Blakeslee v. Hewett,* 76 Wis. 341, 44 N. W. 1105.

The defense pleaded that the notes were delivered to respondent conditionally, and that the conditions were never fulfilled, was negatived by the jury upon ample evidence to support the finding. So we turn to the matter covered by the second defense pleaded; *i. e.* that respondent, seasonably, had in its hands and under its control the means of complete or partial satisfaction of the notes, but applied the collateral to such notes and such means of satisfaction to other purposes than their payment. Several interesting questions are discussed in the briefs of counsel relating to such second defense which are immaterial in view of the findings of the jury that, at the time appellants waived protest on the notes, and prior thereto, they promised to pay them; that with full knowledge of the delivery of the collateral to the $20,000 of notes and the disposition made of the other securities held by the bank for the indebtedness of the Heller Piano Company, and after the maturity of the notes, appellants promised to pay them; and that, with full knowledge of the relation of such collateral to the indebtedness represented by said notes, appellants advised and aided in the transfer of such collateral to the H. P. Nelson Company. There is ample evidence to support such findings.

That there was no consideration which moved to appellants for their promise to pay the notes is not material if such promise was made to induce respondent to look to them and not to the collateral or other means respondent might have for satisfaction, in whole or in part, of the indebtedness, and respondent acted thereon, which seems, clearly, to be the case, as the jury, in effect, found.

There was evidence that when the negotiations were on for turning the collateral over to H. P. Nelson, respondent wanted the entire liabilities of the Heller Piano Company taken out of the bank; that appellants participated in the negotiations and urged respondent to deal with Nelson and the collateral without reference to the notes in suit, *Gether* saying,—"Leave the *Commercial Securities Company* and my papers alone," or words to that effect. "I will take care of them myself. All I want is time. I will pay that; that is my indebtedness"—and that, thereupon, the transaction for turning the collateral and some over $20,000 of the liabilities of the piano company to Nelson was concluded. The jury in making the findings in question must have believed that evidence. Appellants, Nelson, and the piano company were very closely related in business. It was very important to appellants and Nelson to keep such company a going concern, and the arrangement appellants promoted for taking the large amount of piano company indebtedness out of the bank was thought to be vital thereto. It was necessary to such arrangement, as evidence tends to show, which the jury must have believed in coming to the conclusions which they did, that the bank should leave the indebtedness on the notes in suit out of the transaction with Nelson, as a matter to be looked after by appellants. That was done and the business between the bank and the piano company, including the handling of the latter's bank account, was thereafter conducted without reference to the particular indebtedness. It was left out of calculation, as to the piano company, on the theory, apparently, that appellants would care therefor according to the promise which entered into the transaction of releasing the collateral to Nelson. Consistent therewith, the piano company was accommodated by being permitted to do its ordinary business with the bank, undisturbed by the circumstance of the existence of the overdue notes. It deposited drafts for collection, from day to day, as occasion required, and drew against them to meet its necessities. During this time au-

thority was given to the bank by Heller to sell some real estate it held for him and apply the proceeds on indebtedness of the piano company, other than the notes in suit. As to this particular matter, we do not overlook the form of the order as to the sale of the realty and disposition of the proceeds; but the undisputed evidence, as the court instructed the jury, is that the application of such proceeds was directed by Heller to be made upon particular indebtedness, or the understanding was that it should be so applied, and such was done. In short, from the time of the waiver of protest and assurances by appellants that they would take care of the particular indebtedness, the conduct of the bank is inconsistent with any other reasonable theory than that it relied on such assurances and, so relying, that it parted with collateral security for payment of such indebtedness and left the enforcement of the security specially pledged for such payment to be looked after by appellants and omitted to exercise any right it had to resort therefor to the piano company's bank account.

That the evidence shows that the bank relied on the assurances of appellants as stated, as the trial court viewed the matter, if the facts were as indicated in the third, fourth, and fifth findings made by the jury, is evident from the circumstances that the questions which resulted in such findings were submitted on the theory that they covered the essentials of an estoppel *in pais* against appellants efficiently putting forth the matters covered by the second defense pleaded, and no question was submitted in respect to such reliance. Counsel for appellants did not request the submission of any such question. Had one been submitted, there can be no reasonable doubt as to what the answer would have been. It would have been in favor of respondent as a natural result of the other findings and the evidence. In any event, it must be regarded as a verity that the court below decided such matter in favor of respondent under the statutory rule that all matters of fact essential to support a judgment rendered on a spe-

cial verdict, which are controverted on the evidence, if omitted from such verdict and not brought to the attention of the court by request for findings, shall be deemed determined by the court in conformity with its judgment, and consent shall be presumed that such omitted facts be determined by the court. Sec. 2858*m*, Stats.

It needs no discussion to demonstrate that the situation shown by the findings above referred to creates an estoppel in favor of respondent as to all the matters covered by appellants' second defense and precludes them from efficiently making any defense to their alleged liability upon the notes, which they knew, or ought reasonably to have known, existed when they lulled respondent into the belief that they would not question such liability and so induced, or materially aided in inducing, it to take a course by which it would be greatly prejudiced if they were permitted to successfully change their attitude.

If a person acts in his business relations with another, under such circumstances as to charge him with knowledge, that such other may probably rely thereon to his damage in case of such person's conduct thereafter being inconsistent with his former actions and such other does, in good faith, so rely, such person cannot so change his position to such other's prejudice. *State ex rel. Att'y Gen. v. N. P. R. Co.* 157 Wis. 73, 97, 147 N. W. 219.

The doctrine of estoppel is of far-reaching character. While it has been spoken of by some writers with a measure of discredit, as this court remarked in *Marling v. FitzGerald,* 138 Wis. 93, 120 N. W. 388, "It is entitled to the distinction of being one of the greatest instrumentalities to promote the ends of justice which the equity of the law affords." Where the facts call for its application in order to prevent injustice being done, it "has the field to itself" superseding all other rules which have not fully acted upon the particular situation. It absolutely precludes, both at law and in equity, a party

"from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy." 2 Pom. Eq. Jur. (3d ed.) § 804.

We have examined all the features of the briefs of counsel for appellants respecting errors claimed in giving or failing to give instructions, in failing to submit to the jury questions requested, in the admission or rejection of evidence, and others, and it does not seem that this opinion should be extended by referring to them in detail and showing why we are persuaded that no such error in respect to any such matter was committed which probably affected the verdict of the jury as to the matters creating the estoppel upon which, it seems, the judgment is well grounded.

Under the established rule that, no matter how many errors may be committed in the course of a trial, they will not operate to disturb the judgment on appeal unless it appears, pretty clearly, that had they not occurred the result might probably have been more favorable to the party complaining, generally, there is little use in bringing to the attention of this court many detail matters in respect to the admission of evidence, where such matters must be considered in connection with a mass of evidence and many circumstances, in the light of the presumption that the trial was before a competent trial judge and an impartial and intelligent jury. Such a jury may be swayed by immaterial evidence or rather unfair conduct of counsel; but the fact in that regard must, pretty clearly, affirmatively appear from the record, or errors assigned as to such conduct, or mere irrelevant or immaterial evidence, or the rejection of evidence, else the fault, in case of there being any, must be regarded as nonprejudicial.

We may well give some special attention to the claim that judgment should have been awarded appellants because the jury found that Nelson's agreement to pay $20,240.90 to the respondent and to take indebtedness of the piano company to that amount with the collateral thereto out of the bank, was in consideration of the latter's agreement to discount notes of Nelson and his companies to the amount of $60,000, and that such discount was refused. It is considered that,—the jury having also found that the feature of the agreement as to the $60,000 was not to be effective until approved by the board of directors of the bank, and the evidence showing that such approval was to wait upon satisfaction by such board as to representations made by Nelson affecting the character of his paper; that the feature, as to payment of the $20,240.90 to, and taking piano company indebtedness to that amount out of, the bank, was closed up without waiting for action by such board upon the $60,000 matter, and that the closed feature was not thereafter rescinded,—the court was warranted in holding that the result as to the $60,000 was immaterial to the other feature and the promise of appellants to take care of the notes in suit if the bank would deal therewith separate from the other indebtedness and surrender the security which was primarily liable therefor.

The suggestions that the evidence showed $52 to have been paid into the bank as collections on the collateral to the notes in suit after the action was commenced, and that two of the items of collateral were not produced at the trial, and that such matters should have been applied to reduce the liability of appellants, have not been overlooked. The evidence as to the $52 and the disposition thereof is not very clear. It rather seems that *Gether* had the benefit of it or that it was set aside for him and his cosurety. It also seems that the two contracts referred to were accounted for and not lost. In any event, those matters do not seem to have been brought to the

attention of the trial court or that any question was raised in respect thereto by exceptions. On the whole, it is considered that there is no merit in such matters which can now justly work a disturbance of the judgment.

By the Court.—The judgment is affirmed, with costs in this court to the respondent.

A motion for a rehearing and for modification of the mandate was denied, with $25 costs, on June 13, 1916.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY vs. THE STATE.

October 30—December 7, 1915.
May 27—June 13, 1916.

Constitutional law: Supreme court: Original jurisdiction: Actions against the state: Equal protection of the laws: Taxation of life insurance companies: License fees: Classification: Interstate commerce: Investment business of insurance company: Burdening by state law: Statute construed: Interest receipts from policy loans are not "premiums:" Liability to policyholders not an "unconditional debt:" Arbitrary discrimination.

1. Under sec. 3, art. VII, Const., providing that "the supreme court, *except in cases otherwise provided in this constitution*, shall have appellate jurisdiction only," and sec. 27, art. IV, Const., providing that "the legislature shall direct by law in what manner and in what courts suits may be brought against the state," the legislature had power—by sec. 3200, Stats.—to designate the supreme court as the court in which such suits might be brought. *Dickson v. State*, 1 Wis. 122, followed.
2. A corporation is a person within the meaning of the Fourteenth amendment to the federal constitution, and under that amendment a state cannot discriminate against its own citizens and in favor of citizens of other states any more than it can do the reverse.
3. The Fourteenth amendment does not prevent a state from changing its system of taxation in all proper and reasonable ways, nor

from allowing exemptions, nor from imposing specific taxes upon different trades or professions, nor from classifying property for taxation so long as the classification does not invade rights secured by the federal constitution.

4. It is within the power of the state to impose upon life insurance companies occupation taxes in the shape of license fees in lieu of other taxes.
5. The license fees imposed upon life insurance companies by sec. 1220, Stats. 1911 (sec. 51.32, Stats. 1913), are privilege or occupation taxes; and while not subject to the provision in sec. 1, art. VIII, Const., that "the rule of taxation shall be uniform," they are subject to the general equality clauses of the state constitution and to the clause in the Fourteenth amendment Const. of U. S. guaranteeing "equal protection of the laws."
6. A classification of life insurance companies according to which license fees of different amounts are exacted must be founded upon real differences of situation and condition affording rational grounds for the difference in treatment.
7. A classification pursuant to which, in lieu of all other state taxes except taxes on real estate, domestic level-premium life insurance companies are required to pay much larger license fees than are exacted from foreign level-premium companies, is justified by the location for taxing purposes of their vast reserves—those of the domestic companies being taxable in this state while those of the foreign companies are, practically, not so taxable and are presumably subjected to just and adequate taxation in their respective domiciles.
8. So, also, a classification under which license fees are exacted from level-premium life insurance companies but not from fraternal benefit associations having lodge organizations is justified by real and substantial differences.
9. The reasons which justify a classification under which domestic level-premium companies pay higher license fees than foreign level-premium companies apply with greater force and justify a similar discrimination between domestic level-premium companies and foreign assessment or stipulated premium companies.
10. The business of insurance, *i. e.* issuing policies, collecting premiums, and paying losses, is not interstate commerce; but whether that branch of the business of a life insurance company which consists in loaning money upon real estate or other security to citizens of other states is to be deemed a mere incident of the insurance business or should be considered as a separate business and as a form of interstate commerce, is not decided.
11. Assuming that the foreign investment business done by a domestic life insurance company constitutes interstate commerce, no

burden is placed upon such commerce by the state law (sec. 1220, Stats. 1911: sec. 51.32, Stats. 1913) requiring the company to pay as a license fee a certain percentage of its gross income (excepting therefrom rentals of real estate on which the taxes have been paid, and premiums collected outside the state on policies held by nonresidents) for transacting the business of life insurance in this state. The tax in such case is not levied upon the foreign investment business nor on the receipts therefrom, but on the business of life insurance, and said receipts are simply used in measuring in part the amount of the tax.

12. When the state exercises its legitimate and rightful power of taxation of an occupation or privilege, it may rightfully measure that taxation either by property or the receipts from property neither of which are in themselves taxable.

13. Although a claim presented to the legislature for recovery of license fees paid by a life insurance company was based chiefly on the contention that the whole tax was invalid because of the unconstitutionality of the law under which it was exacted, yet the further distinct assertion therein that, even if the law were to be held constitutional, portions of the amount collected were illegal and should be refunded, was sufficient under sec. 3200, Stats., to give this court jurisdiction of that part of the claim.

14. Receipts of interest on premium notes and on policy loans or liens constitute a part of the gross income of a domestic level-premium life insurance company, upon which, under sec. 1220, Stats. 1911 (sec. 51.32, Stats. 1913), the three per cent. license fee is to be calculated. The interest on policy loans made to nonresident policyholders, although it may possess some characteristics of premiums, is not a part of the "premiums" collected outside of the state on policies held by nonresidents, within the meaning of said section.

15. A life insurance company's liability to policyholders, *i. e.* the present value of its outstanding policies valued as required by law, is not an "unconditional debt" within the meaning of our former statutes exempting from taxation so much of the securities and credits of a taxpayer as should "equal the amount of *bona fide* and unconditional debts by him owing."

16. The disparity between the tax burden of the plaintiff insurance company under the license system and that which it would bear if taxed under the income taxation system or the former personal property taxation system is not shown by the complaint in this case to be so great that the statute imposing license fees should be condemned as arbitrarily discriminatory.

TIMLIN, J., dissents.

ACTION brought originally in the supreme court under the authority of sec. 3200, Stats.

For the plaintiff there was a brief by *Geo. H. Noyes,* counsel, a reply brief by *Geo. H. Noyes,* attorney, and *John M. Olin* and *Byron H. Stebbins,* of counsel, and a supplemental reply brief by *H. L. Butler,* of counsel; and the cause was argued orally by *Mr. Butler* and *Mr. Stebbins.*

For the defendant there was a brief by the *Attorney General* and *Walter Drew,* deputy attorney general, and oral argument by *Mr. Drew.*

The following opinions were filed December 7, 1915:

WINSLOW, C. J. The plaintiff, a domestic mutual life insurance corporation, doing business on the level-premium plan, brings action in this court against the state to recover license taxes paid to the state under protest amounting to $482,193.23 in 1912 and $505,643.22 in 1913.

The license taxes were levied under sec. 1220, Stats. 1911 (being sec. 51.32, Stats. 1913), and the plaintiff's claim is that the statute is void (1) because it denies the equal protection of the laws guaranteed by the state constitution and by the Fourteenth amendment to the federal constitution, and (2) because it unlawfully interferes with interstate commerce. The complaint shows that the claims were duly presented to the state legislature and disallowed. The state demurs (1) because this court has no jurisdiction of the defendant's person, (2) because it has no jurisdiction of the subject of the action, and (3) because the complaint does not state a cause of action.

In support of the first two grounds of demurrer it is argued that sec. 3200 of the Statutes, under the terms of which this action is brought by original action in this court, is void because it attempts to confer original jurisdiction upon this court in violation of sec. 3 of art. VII of the state constitution,

the provisions of which, so far as material to this inquiry, are that "the supreme court, except in cases otherwise provided in this constitution, shall have appellate jurisdiction only."

It is sufficient to say in answer to this objection that sec. 27 of art. IV of the constitution provides that "the legislature shall direct by law in what manner and in what courts suits may be brought against the state," and that it was decided by this court in 1853 (*Dickson v. State,* 1 Wis. 122) that this section gave power to the legislature to designate the supreme court as the court in which such suits might be brought, such designation being considered as one of the exceptions referred to in sec. 3 of art. VII.

This decision has never been overruled or questioned. It directly sustained the constitutionality of ch. 249 of the Laws of 1850, which has been upon our statute books ever since, and with unsubstantial changes now appears as secs. 3200–3203 of the Statutes. This decision has also been uniformly recognized in numerous instances by all departments of the state government, legislative, executive, and judicial, as correctly construing the constitution from the time of its rendition up to the present time, a period of more than sixty years. To overrule it now would be hardly permissible even if we were convinced (which we are not) that it was incorrect as an original proposition.

The law in question provides in substance that every company transacting the business of life insurance in this state (except fraternal societies having lodge organizations and insuring only their own members) shall annually pay as license fees for transacting such business and in lieu of all other taxes, except taxes on real estate, the following amounts:

Domestic level-premium or old-line companies *three per centum* of the gross income for the year, excepting therefrom rentals of real estate on which the taxes have been paid, and premiums collected outside the state on policies held by nonresidents;

Foreign level-premium or old-line companies $300, except that whenever the law of the foreign company's domicile requires a larger license fee or tax to be paid by an outside company as a condition for the issuance of a license, then such foreign company shall pay the same fee or tax for a license permitting it to do business in this state;

Stipulated premium companies, foreign or domestic, $300;

Assessment companies, foreign or domestic, and fraternal associations having no lodge organizations, $300;

Fraternal associations having lodge organizations and insuring only their own members, nothing.

The plaintiff's first claim is that this law denies to it the equal protection of the laws because it makes arbitrary discrimination (1) as between it and foreign level-premium companies, (2) as between level-premium companies and fraternal insurance organizations, and (3) as between domestic level-premium companies and assessment and stipulated premium companies.

The plaintiff's second claim is that the law unlawfully hampers and interferes with interstate commerce.

These claims will be discussed in their order.

1. Under this head the most serious contention doubtless is the contention that there is arbitrary and illegal discrimination between the plaintiff and foreign companies of the same class, *i. e.* companies doing life insurance business in this state on the level-premium plan. The plaintiff, a domestic corporation, is required to pay for the privilege of doing business in this state a license fee amounting to three per centum of its gross receipts (certain classes of receipts being excepted), while foreign corporations doing business upon the same plan are required to pay only $300 per year (except in cases where the retaliatory clause is called into operation) for the same privilege.

It is clear that this so-called license fee is a privilege or occupation tax, and that, while it is not subject to that clause of

the state constitution which requires the taxation of property to be uniform (sec. 1, art. VIII), it is subject to the general equality clauses of the state constitution and to the clause guaranteeing the "equal protection of the laws" contained in the Fourteenth amendment to the federal constitution. It is clear also that this means that there can be no arbitrary or whimsical classification, but that there may be classification founded upon real differences of situation and condition affording rational grounds for the difference in treatment. *Black v. State,* 113 Wis. 205, 219, 89 N. W. 522; *Nunnemacher v. State,* 129 Wis. 190, 220, 108 N. W. 627; *Beals v. State,* 139 Wis. 544, 557, 121 N. W. 347; *Connolly v. Union S. P. Co.* 184 U. S. 540, 559, 560, 22 Sup. Ct. 431.

The disparity between the annual license fee required of domestic companies by the law in question and the fee required of foreign companies is admittedly very great, and the question arising is simply whether there is any substantial difference, other than the difference between foreign and domestic corporations, which differentiates the two classes and which justifies such great difference in treatment.

The question is by no means an easy one. A corporation is a person within the meaning of the Fourteenth amendment, and a state cannot under that amendment discriminate against its own citizens and in favor of citizens of other states any more than it can do the reverse. *Yick Wo v. Hopkins,* 118 U. S. 356, 6 Sup. Ct. 1064; *State v. Hoyt,* 71 Vt. 59, 42 Atl. 973. Every *person,* whatever his citizenship, is protected against unequal laws.

On the face of it this law seems to allow foreign life insurance companies to do business in this state upon payment of a mere nominal fee, while exacting from domestic companies for the same privilege a very large fee. Are there any real differences between the two classes which bear a just and proper relation to the attempted classification and justify this difference of treatment? If there are such differences the

law may doubtless be justified so far as this objection is concerned, for it is quite well established that the Fourteenth amendment does not prevent a state from changing its system of taxation in all proper and reasonable ways, nor from allowing exemptions, nor from imposing different specific taxes upon different trades or professions, nor from classifying property for taxation so long as the classification does not invade rights secured by the federal constitution. *Bell's Gap R. Co. v. Pennsylvania,* 134 U. S. 232, 10 Sup. Ct. 533; *Connolly v. Union S. P. Co., supra.*

The question whether there are substantial differences of condition reasonably suggesting the propriety of difference of treatment is primarily a legislative question, and the legislative judgment thereon is not to be disturbed by the courts unless legislative action has clearly passed the boundaries of reason. Given the differences of condition above referred to and the field of legislative action is very broad. The legislative judgment is not to be interfered with merely because the judicial mind might reach a different conclusion as to the policy or wisdom of the law nor unless the court can confidently say that no reasonable ground can be discovered to support the classification.

In approaching this question it is important to note at the outset that the license tax in question is levied *in lieu* of all other state taxes except taxes on real estate owned by the company. It covers all the contributions which the state demands from the company or its business except real-estate taxes, which are relatively small in amount. It is common knowledge that all of the great level-premium insurance companies of the present day have vast reserve funds, to protect their liabilities on policies, running up into the hundreds of millions of dollars, and that these reserves are invested in interest-bearing securities, of which real-estate loans secured by mortgage generally form the largest part. In the complaint in the present case it appears that on December 31, 1911,

the plaintiff had outstanding loans secured by real-estate mortgages amounting to $153,562,654.39, of which only $5,654,369.10 covered real estate in Wisconsin. It also appears that the plaintiff's income from real-estate mortgages for the year ending on said last named date amounted to $7,446,393.10 and its income from bonds to $3,172,489.58. These securities are all credits, *i. e.* personal property of an intangible character, the situs of which for the purposes of taxation is in this state at the residence of the corporation.

The power of the state under the constitution to levy occupation taxes in the shape of license fees in lieu of other taxes cannot now be questioned. *Chicago & N. W. R. Co. v. State,* 128 Wis. 553, 589, 108 N. W. 557; *Nunnemacher v. State,* 129 Wis. 190, 108 N. W. 627. Having determined on the license system of taxation for all life insurance corporations, the state faced this situation: on one hand were the domestic level-premium companies (of which the plaintiff is by far the most conspicuous example), having their reserves invested in securities or credits, all of which were not only taxable in Wisconsin but should, in justice to other taxpayers, contribute to the expenses of the government which created and protects their owners; and on the other hand were the foreign level-premium companies, also having great reserves, practically none of which were taxable in Wisconsin and which were presumably subjected to just and adequate taxation in their respective domiciles. The essential difference was not the difference in residence but the difference in the location for taxing purposes of the reserves. This difference is certainly a very real one, germane to the subject of license-fee taxation, and it plainly suggests, if it does not indeed demand, some substantial difference of treatment in the matter of the amount of the fees exacted. It would be indefensible to subject both classes to the merely nominal fee of $300, thus allowing the great reserves of the local companies to escape taxation entirely, and it would be equally indefensible to exact of

both classes a fee large enough to accomplish just taxation of the domestic company. The first course would practically exempt from taxation a very large volume of the state's taxable property, thus increasing the burdens of all other taxpayers, and the second course would probably bar out every foreign life insurance company from the state, and either course would manifestly give to the domestic companies a very great advantage over foreign companies doing the same business.

Plainly, the only course which could be followed, if just taxation were to be approximated under the license system of taxation, was a course which should in some way compel the domestic company to make a fair contribution to the support of its home government, while recognizing and allowing for the fact that presumably every foreign company is compelled by its home state to do substantially the same thing.

Whether this be done by personal property taxation, by income taxation, or by license-fee taxation was, we think, a question for the state to decide. We are unable to say that the state has not acted within the bounds of reason in fixing the license fees in the present case. It seems quite certain that a personal property tax would have exacted far larger contributions from the plaintiff to the public revenues than the license fee provided by this law.

It is not to be expected that any precedent exists exactly on all-fours with the present case, but we think it clear that the principle upon which the classification in question is based has been approved in a number of cases decided by the federal supreme court in recent years. *Pacific Exp. Co. v. Seibert,* 142 U. S. 339, 12 Sup. Ct. 250; *Kidd v. Alabama,* 188 U. S. 730, 23 Sup. Ct. 401; *Brown-Forman Co. v. Kentucky,* 217 U. S. 563, 30 Sup. Ct. 578.

The conclusion reached on this branch of the argument renders it unnecessary to consider at length the question whether the law is in any respect aided by the retaliatory feature. Retaliatory laws have been held valid by the fed-

eral supreme court (*Philadelphia F. Asso. v. New York,* 119 U. S. 110, 7 Sup. Ct. 108), and we find no necessity for considering the question as to the practical effect of that feature in the present law. Any effect which it may have must of course be in the direction of lessening the disparity in treatment of which the plaintiff complains in the present case.

This brings us to the contention that there is unlawful discrimination between level-premium companies and fraternal benefit associations having lodge organizations, which, under the terms of the law, are exempted from the payment of any license fees. We do not feel that we should be justified in consuming any considerable amount of time or space in meeting this contention.

That there is much difference of condition between the great level-premium company with its great reserves and the ordinary fraternal benefit association cannot be questioned. That the differences are such as to justify classification and difference of treatment so far as license taxation is concerned seems to us quite evident. The level-premium company is purely a business concern; the true fraternal benefit association is a banding together of many groups of neighbors primarily for social purposes, but with the further idea of rendering mutual help in misfortune, sickness, or death and inculcating the principles of brotherhood among the members. Such associations have no great expense account, they conduct the insurance feature of their organizations at comparatively small cost, and they have no such immense volume of reserve funds. Probably the lodge organization is their most marked differentiating characteristic. It is this characteristic which the legislature has chosen as decisive of their character, and we do not feel that we can say that the choice was made without reason. It avails not to say that there may be some instances where the lodge organization is almost or quite a pretense and the supposed fraternal association really approaches very closely to an insurance company. Nearly all classification possesses this defect. Individual cases near the border line

on either side often present no differences worthy of notice, but this does not invalidate the classification. It is the class, considered broadly as a class, which must possess the substantial differences suggesting the propriety of different legislative treatment, not every individual of the class. This principle is familiar.

This state has recognized the distinct and exceptional character of fraternal associations and treated them as forming a class which should be subject to its own legal code since 1889 and still continues to do so. Sec. 1956 *et seq.* Stats. The brief of the state informs us that the laws of forty-two states recognize the same distinction and that twenty-nine of these states have specified the lodge system as one of the distinguishing features of such organizations. We have not verified all of the citations, but have no doubt of their substantial accuracy. We see no reason to doubt that the differences between these organizations as a class and level-premium insurance companies as a class are so real and substantial as amply to justify classification. This conclusion receives support in the case of *German Alliance Ins. Co. v. Lewis,* 233 U. S. 389, 34 Sup. Ct. 612.

We now reach the alleged illegal discrimination between domestic level-premium companies on the one hand, and assessment and stipulated premium companies, whether foreign or domestic, on the other. The following statements from insurance writers are quoted with apparent approval in the plaintiff's brief:

"The assessment system . . . is that one under which, theoretically, the cost of the insurance is annually collected from the members by assessing on them the costs. In practice there have been so many modifications of this theory that it is difficult to characterize the assessment plan, but the essential idea in this system is that no reserve is collected." Gephart, Principles of Insurance, pp. 100, 101.

"For a long time they [assessment companies] were all agreed that a reserve was not merely unnecessary but useless and dangerous. But after a time the simple science of the

natural premium tables made it clear that, whether a society regarded it or not, there is a gradual and inevitable advance in the cost of insurance with the increase of hazard because of the advancing ages of the insured; and, consequently, several co-operative companies gave up the principle of 'pay as you go' and collected such amounts in excess of current expenses and losses as in the varying opinions of their managers would be likely to hold the premiums stable. The variety of views as to the cause of alterations in current cost and the mode of remedying them is indicated by various terms adopted to designate the reserve accumulations—emergency fund, guarantee fund, mortuary reserve fund, special reserve fund, and the like. This is a very great change from the original basis and utterly invalidates the narrow and specific definition of assessment insurance which has been given. The new definition must cover practically all forms of insurance which do not make compliance with legal reserve laws fundamental; in fact, such compliance or noncompliance may be made the shibboleth to distinguish the two forms of insurance." Dawson, Assessment Life Insurance, pp. 4, 5.

"The assessment companies . . . are less scientific in their operations. No mortality tables are used, no interest rates are assumed, and no technical reserves maintained. The original plan of the purely assessment companies was to wait until one or more losses had occurred and then levy an assessment sufficient to cover such loss or losses. This, however, proved uncertain and so annoying to the members that they invariably withdrew, the young and healthy withdrawing first. This left the old and decrepit to pay the consequent increasing assessments and finally to meet with disaster. A variety of methods have been tried to obviate this difficulty. In late years most of these associations have collected advance assessments in the form of stipulated premiums and have accumulated so-called 'reserves.'" Wisconsin Insurance Report, 1907 (Life and Casualty), 39, 40.

"A term [stipulated premium] somewhat vaguely applied to the premium charge of sundry assessment associations. Instead of irregular assessments, a stipulated amount yearly is charged, the same to remain level until found inadequate for the payment of increasing death losses, when an additional charge may be made. The original charge, the so-called 'stipulated premium,' varies in different associations according to the guess of the management. It serves the purpose

for a few years, but sooner or later proves inadequate, and must be increased in amount or an additional assessment must be made." Jackson, Definitions in Life Insurance, p. 24, No. 51.

It is quite apparent from these three excerpts that assessment insurance pure and simple, except so far as the fraternal orders are concerned, has broken down, and that experience has demonstrated that a premium plan having some resemblance at least to the level-premium plan must be adopted if assessment companies are to live. The legislature of Wisconsin recognized the inherent weaknesses of assessment insurance as early as 1899, and by ch. 270 of the laws of that year authorized the formation of companies on the stipulated premium plan and provided for the reincorporation of assessment associations or societies under the act. This act required the charge by such companies of net premiums calculated on mortality tables equal to that of yearly term insurance at the age of entry and increased at least twenty-five per cent. It also provided for the accumulation of certain reserves. This act was evidently not satisfactory and was repealed by ch. 121, Laws 1907. By ch. 447 of the laws of the same year two sections were added to the Statutes which are now numbered secs. 1955*y*—1 and 1955*y*—2.

The first of these sections provides that no life insurance company (other than fraternal associations) "which issues contracts, the performance of which is contingent upon the payment of assessments or calls made upon its members, shall do business within this state except *such companies or associations as are now authorized* to do business within this state *and which shall value* their assessment policies or certificates of membership as yearly renewal term policies according to the standard valuation of life insurance policies prescribed by the laws of this state." The section further provides for the details of the required valuation and also compels the company to keep a certain reserve.

By this section all assessment companies were forbidden to

do business in the state in the future except those which were lawfully doing business here at the time of the passage of the law and they were required to adopt the stipulated premium plan. It appears by the published reports of the insurance commissioner that at the time of the passage of this law (ch. 447, Laws 1907) and for some time prior thereto there were no domestic assessment companies doing business or licensed to do business in the state. The law inhibits them in the future, hence there is no such class as domestic assessment or stipulated premium companies and can be none.

There were but three foreign assessment companies doing business in the state in 1907 and there is said to be but one now. This company must, of course, be doing business on the stipulated premium plan and must constitute the entire class. The reasons already given for upholding classification as between domestic and foreign level-premium companies apply with greater force to the classification as between domestic level-premium and foreign assessment or stipulated premium companies.

2. Passing to the consideration of the question whether the statute imposes an unlawful burden on interstate commerce the argument is that, while the business of insurance, *i. e.* issuing policies, collecting premiums, and paying losses, is not interstate commerce (*New York L. Ins. Co. v. Deer Lodge Co.* 231 U. S. 495, 34 Sup. Ct. 167), the business of loaning money on real estate or other security to the citizens of other states is undoubtedly interstate commerce which is necessarily burdened by the tax in question. The investment business of the plaintiff is indeed a vast one considered by itself alone. It appears that the plaintiff in December, 1911, possessed nearly $150,000,000 worth of foreign mortgage loans, and between $70,000,000 and $80,000,000 worth of foreign bonds. The carrying on of such a business necessarily requires constant transmission from state to state of applications for loans, abstracts, notes, bonds, mortgages, policies, drafts, and other

papers, to say nothing of the employment of agents in the various states where the loans are made.

It is said that the foreign investment branch of the business is not interstate commerce because it is a mere necessary incident of, and cannot be considered apart from, the insurance business, which, as we have seen, is held by the federal supreme court not to be interstate commerce. The argument may be sound, but we do not pass upon it. We shall undertake no voyage of discovery on the sea of interstate commerce unless we are compelled to do so. That sea is a troubled one, full of rocks and shoals, as yet imperfectly charted. We do not find ourselves compelled to embark upon it in this case.

If, as argued by the plaintiff, the investment business be a separate business and a form of interstate commerce, the answer is that the law places no burden upon that business. It requires the payment of a license fee for transacting life insurance business in this state. The plaintiff is not required to transact this last named business; it may do so or not, as it pleases. If it does not do so, it may transact all the investment business which it desires to transact without paying any license fee under this law.

It is very well established by federal decisions that when the state exercises its legitimate and rightful power of taxation of an occupation or privilege it may rightfully measure that taxation either by property or the receipts from property neither of which are in themselves taxable. *Maine v. G. T. R. Co.* 142 U. S. 217, 12 Sup. Ct. 121, 163; *Flint v. Stone Tracy Co.* 220 U. S. 107, 31 Sup. Ct. 342; *Baltic M. Co. v. Massachusetts,* 231 U. S. 68, 34 Sup. Ct. 15. In the last cited case it is said in the opinion:

"It is the commerce itself which must not be burdened by state exactions which interfere with the exclusive federal authority over it. A resort to the receipts of property or capital employed in part at least in interstate commerce, when such receipts or capital are not taxed as such but are taken as

a mere measure of a tax of lawful authority within the state, has been sustained" (citing cases).

These cases seem to us decisive of the question here. The receipts from the foreign investment business are simply used as measuring in part the amount of the tax to be levied, not on that business nor on the receipts themselves, but on the business of life insurance conducted by the plaintiff, a subject of taxation which is unquestionably within the legitimate taxing power of the state.

3. A separate contention, affecting a part only of the tax collected, is yet to be considered.

It appears by the complaint that the total income of the company by which the license fee for the year ending December 31, 1911, was measured was $16,073,107.76, of which sum $2,163,808.84 consisted of interest on premium notes and policy loans or liens. Receipts of the same character, though differing somewhat in amount, were included in the income of the following year. The plaintiff's claim is that these receipts are not "income within the meaning of the law," and hence that a ratable proportion of the license fee paid should be recovered, irrespective of the result on the general question of the constitutionality of the law.

It appears that the so-called policy loans are made to policyholders by virtue of a clause in the policies which declares that, on request of the assured and upon sole security of the policy properly assigned, the company will advance, at a rate of interest not exceeding six per cent. per annum, an amount which, with interest, shall equal the cash surrender value of the policy. The argument is that, while these arrangements are called "loans," they are in fact but advance payments of amounts already owing to the policyholder and the so-called interest is simply an additional premium for continued insurance, and reliance is placed on the case of *New York L. Ins. Co. v. Assessors,* 158 Fed. 462, affirmed in *Orleans Parish v. New York L. Ins. Co.* 216 U. S. 517, 30 Sup. Ct. 385.

The state makes a preliminary objection to the consideration of this claim to the effect that it has never been presented to the legislature and hence that the court, under sec. 3200, Stats., has no jurisdiction to consider it. Examination of the claims presented to the legislature by the plaintiff, copies of which are attached to the complaint, certainly show that the invalidity of the whole tax by reason of the unconstitutionality of the law was the contention chiefly relied upon. The claims, however, both contained the distinct statement that the tax complained of was "in excess of the amount legally required" under the law in question, "portions of said amount being derived from a percentage of amounts not constituting taxable incomes of said company," and the claims also prayed for refund of the amounts paid, "or such portions thereof as may be ascertained the state was not entitled to receive."

We are not disposed to draw fine lines on this question. While the plaintiff's claim did not go into details, it did certainly make the distinct assertion that there were portions of the fee which were illegal and which it sought to recover even if the law itself were to be held constitutional.

The plaintiff argues that, if these so-called interest payments be in fact premiums, they are premiums collected outside of the state on policies held by nonresidents and hence are not part of the income made by the law the measure of the taxation.

The complaint charges that "the proportionate part of the business transacted by it through commercial intercourse with residents of states other than Wisconsin was on December 1, 1911, approximately as follows:

"1. . . . . .

"2. . . . . .

"3. . . . . .

"4. Of the total amount of outstanding policy loans or advances more than 93 per cent."

For the purposes of the case we assume that this should be

construed as meaning that more than ninety-three per cent. of the policy loans are made to nonresidents of Wisconsin and hence that the payments of interest thereon are payments made outside of the state by nonresidents thereof. Even with this assumption we do not think the plaintiff's contention can be sustained.

In the case cited (*Orleans Parish v. New York L. Ins. Co.* 216 U. S. 517, 30 Sup. Ct. 385) the state legislature of Louisiana had passed a law attempting to tax a foreign insurance company on such policy loans as "credits" within the state. The trial court and the United States supreme court held that they were in fact but advance payments made by the insurance company, and that the so-called note given as evidence of the advance did not represent a debt because there was no debt created, and if no debt no credit.

Accepting this doctrine fully it nevertheless does not control this case. The question here is simply, What did the legislature mean by the words "gross income" and "premiums collected"?

If they used these words in their ordinary everyday sense (and there is nothing to show to the contrary), then the case cited has no appreciable bearing on the present controversy, because it must be admitted at once that the interest payments on policy loans have never been called premiums either by the plaintiff or by the public generally. If they are not "premiums" within the meaning of that word as used in the act they are necessarily a part of the "gross income" upon which the three per centum must be calculated.

The fact that in a logical sense they may possess more of the characteristics of premiums than of credits cuts no figure. The controlling question is whether the legislature intended to include them when it used the word "premiums." We are clearly of opinion that there was no such legislative thought.

Our conclusion is that the complaint states no cause of action.

By the Court.—Demurrer overruled as to the first and second grounds and sustained as to the third ground, and judgment ordered that complaint be dismissed on the merits with costs.

TIMLIN, J. (*dissenting*). I am unable to agree with the disposition of this case made by the majority of the court and shall state as briefly as possible the grounds of my dissent.

1. The case of *International T. Co. v. Peterson,* 133 Wis. 302, 113 N. W. 730, was decided (not without misgiving) before the decision in *International T. Co. v. Pigg,* 217 U. S. 91, 30 Sup. Ct. 481. The latter was a default case, and the *Peterson Case* also went by default in that high court. But both cases were, after full argument, reviewed and confirmed in *New York L. Ins. Co. v. Deer Lodge Co.* 231 U. S. 495, 510, 34 Sup. Ct. 167, and it was there affirmed, contrary to the decision of this court in the *Peterson Case,* that the transmission, for a cash consideration paid or promised, of didactic written or printed discourse with explanatory diagrams and charts and with text-books, not for resale, from a person in one state to a person in another state, constituted interstate commerce. These decisions were not alone precedents, they were also events in the development of federal and state relations under the federal constitution. Another event which has since occurred is the enactment of the currency bill with its chain of banks and the necessity of a continual transmission of money, notes, bonds, and securities from one state to another. So that, without going into any further specification or analysis of federal decisions, I think there can no longer be any doubt that carrying on a loan business involving the transmission of money and securities with the necessary correspondence, instructions, vouchers, and other writings, constitutes interstate commerce. I do not know of any principle or precedent that would warrant us in saying that, because the plaintiff is an insurance company

whose business of delivering policies and collecting premiums is not commerce, no act done by it can be called commerce which would have been commerce if done by another. It seems to me that this would be a far-reaching restriction upon commerce and would introduce into a subject already too complicated a multitude of new and puzzling questions. Neither can I bring myself to believe that all transactions relating nearly or remotely to or even necessary to a business that is not commerce can be excluded from the meaning of the word "commerce." On the other hand, when I examine the question whether that part of plaintiff's business which consists of policy loans to nonresidents is the equivalent of collecting premiums, I am brought up against the difficulty that if it is it should have been excluded from the base of computation by the terms of the statute, and if it is not it is interstate commerce and should have been excluded. With reference to the other loans to nonresident persons, natural or corporate, I consider this business clearly interstate commerce. Therefore the income from the loan business carried on by the plaintiff with persons in other states, which forms the principal part of the base of computation upon which the amount of plaintiff's tax is computed, is the income of interstate commerce notwithstanding that plaintiff's business of delivering insurance policies and collecting premiums is not such commerce. *New York L. Ins. Co. v. Deer Lodge Co.* 231 U. S. 495, 34 Sup. Ct. 167. "Gross income" is the practical equivalent of gross receipts in such business.

2. I think the statute in question, sec. 1220, Stats. 1911, could and should have been so construed as to save it from all taint of unconstitutionality. This would, of course, permit some recovery by the plaintiff. Why does the statute exempt from the base upon which the amount of license fee is computed "premiums collected outside of the state of Wisconsin on policies held by nonresidents of the state of Wisconsin"? I do not think we can say with any confidence that it was be-

cause the state in which nonresidents of Wisconsin lived might, by excise or other form of taxation, reach such premiums and so cause double taxation, because in the parallel case of real estate situated outside of this state, and referred to in the same section, the income is exempted only in these cases where the corporation has paid the taxes assessed on the land, and further because the other state might as easily collect taxes on income from loans made and collected in that state as upon premiums so collected. If the premiums mentioned were thought by the legislature to be income derived from interstate commerce, that would be an argument in favor of the additional exemption of interest on loans collected in like manner, which is more surely interstate commerce. If it was considered that such premiums did not constitute an income from interstate commerce, why should the legislature relieve that which it believed was not interstate commerce and thus increase the burden upon the latter commerce by making the income from such interstate commerce a larger part of the base of computation? We are not to interpret the statute upon any theory that the words have no significance beyond the mere exemption of the specified premiums. But even if we so limit these words we would be called upon to include in the word "premiums" all collections outside of the state which by fair interpretation could be covered by the word "premiums," and if necessary to uphold the statute the comprehensive words "from all sources" should, upon approved rules of interpretation, be restrained so as to include only such sources as the state legislature had jurisdiction to include in the base of computation and so as to exclude income derived from interstate commerce. *Waters-Pierce Oil Co. v. Texas,* 177 U. S. 28, 20 Sup. Ct. 518; *Elwell v. Adder M. Co.* 136 Wis. 82, 116 N. W. 882.

3. With the interpretation given to this statute by the taxing officers of the state and approved by the majority opinion, I think, with all deference to that opinion, the statute is un-

constitutional as not only a burden upon, but a very plain attempt at, a kind of regulation of interstate commerce. The requirement of a license as a prerequisite to carrying on any business has always, I think, been considered one of the most effective and drastic modes of regulation. Failure to obtain the license, where one is lawfully required, outlaws the business and avoids the contracts made by him who fails to obtain the license and yet carries on business. When an excise tax is laid upon any business or occupation enforced by the requirement of a license and the license fee fixed by a percentage on the gross income, if that income is derived in whole or in great part from interstate commercial transactions, then the license fee necessarily increases with the increase of interstate commerce and diminishes with its diminution. It makes no difference in this result if the total gross income is derived from interstate commerce or only a substantial part of it. If it were conceded that the license fee in the case last stated was a prerequisite to engaging in interstate commerce, there could be no question, I think, but that such mode of measuring the amount and enforcing the payment of the excise tax would be a direct regulation of, or an unquestioned burden upon, interstate commerce. I think the majority opinion misapprehends the nature and effect of statutes requiring a license. Such statutes provide an effective mode of compelling the observance of regulations or the payment of a tax. They go to the remedy. The objectionable part of this statute is that which requires the plaintiff to pay three per cent. on its gross income. (Cases cited like *Maine v. G. T. R. Co.* 142 U. S. 217, 12 Sup. Ct. 121, 163, are obviously not in point here.) The legal effect of all such statutes is to say: "You are prohibited from carrying on the designated business or making the included contracts unless you pay a sum of money or submit to the specified regulations." The license is only the voucher which proves that the licensee has complied with the law. In the history of taxation in England there is

the story of old Isaac of York, who was induced to pay his taxes by pulling out one of his teeth every day until he paid. The law might have said to him with the same effect: "By the payment of a sum equal to the tax demanded you can obtain a license which will authorize you to keep all your teeth." If this law seeks to coerce the payment of a tax based upon gross income from interstate commerce by depriving the plaintiff of some other right, property, or privilege not connected with or a part of interstate commerce, then if this latter right, property, or privilege is valuable enough, the withholding of license and the consequent outlawry of plaintiff's domestic insurance business is as effective an interference with interstate commerce as if the statute expressly made the obtaining of license a condition precedent to carrying on the business of interstate commerce. We are all familiar with the instances where the obligation to obtain a license before embarking in a specified business or calling is enforced by penalties or forfeitures from which the proposed licensee enjoys immunity if he pays the sum required for the license. So here, if plaintiff pays a percentage of its gross income from interstate commerce it may have a license to carry on its intrastate business, otherwise not and so otherwise subject to penalties.

4. I think the classification made by the act in question could be upheld if there were no questions of interstate commerce involved.

On January 11, 1916, upon motion of the plaintiff, the mandate was amended so as to allow an amended complaint to be received and filed. The defendant demurred to such complaint on the ground that it did not state facts sufficient to constitute a cause of action.

For the plaintiff there was a brief by *Olin, Butler, Stebbins & Stroud,* and oral argument by *Harry L. Butler* and *Byron H. Stebbins.*

For the defendant there was a brief by the *Attorney General* and *Walter Drew,* deputy attorney general, and oral argument by *Mr. Drew.*

The following opinion was filed June 13, 1916:

WINSLOW, C. J. Pursuant to leave of court an amended complaint has been filed in this action to which the state has demurred and argument has been had thereon.

While many new allegations have been added to the complaint we do not regard the situation as essentially changed. The new allegations, for the most part, merely add details to facts alleged in general terms in the original complaint or assumed to exist by the former decision.

We deem it necessary to refer to but two points which are urged by the plaintiff.

The great disparity between the taxation of foreign and domestic level-premium companies is very strongly urged and said to be so great as to be manifestly unconscionable and arbitrary. In this connection it is argued that if a personal property tax had been levied on the plaintiff's reserve, consisting of securities and credits, there would have been deducted from the amount thereof, under the existing policy of the state with regard to the taxation of such property, its liabilities to policyholders, *i. e.* the present value of its outstanding policies valued as required by law, which is about ninety per cent. of the reserve. It is also argued that if the plaintiff had been subjected to income taxation under the state law it would have paid much less than under the three per cent. license fee requirement.

We do not regard either contention as well founded. Our statutes governing the taxation of securities and credits for many years provided that there should be exempted from taxation so much thereof as "shall equal the amount of *bona fide and unconditional* debts by him owing." This provision was repealed by the Income Tax Law, which marked the abandon-

ment of the attempt to levy personal property taxes upon that species of property. Ch. 658, Laws 1911.

It seems entirely clear that the liability to policyholders which the plaintiff refers to is not in any sense an "unconditional debt," and as the policy of the state has never extended the exemption to any liability short of an unconditional debt we are unable to see any sound basis for the argument made.

As to the contention that if the plaintiff were taxed under the income tax system its tax burden would be far less than under the present license system, we shall not attempt to go into the arguments and figures presented in detail. It is sufficient to say that we do not think it appears from the allegations of the amended complaint that the plaintiff now pays substantially greater sums than it would pay under either the income taxation system or the former personal property taxation system.

At all events there does not affirmatively appear to be any such disparity as would condemn the law as arbitrarily discriminatory.

The interstate commerce feature of the case is reargued and the recent case of *Kansas City, Ft. S. & M. R. Co. v. Botkin,* 240 U. S. 227, 36 Sup. Ct. 261, is called to our attention as in conflict with the previous opinion in the present case. We have been unable to see in what respect the cases conflict. There are no other contentions made which we deem it necessary to comment upon.

Upon the opinion previously rendered as supplemented by the present opinion the demurrer must be sustained.

By the Court.—The demurrer to the amended complaint is sustained, and judgment ordered dismissing the action on the merits without costs.

WILL OF WATERBURY: STONE, Executor, Appellant, vs. STONE, Respondent.

May 3—June 13, 1916.

Wills: Construction: Intention: Division of residue: Appeal: Bill of exceptions, when unnecessary.

1. Rules of construction are not to be applied to ascertain the meaning of a will if it can be ascertained from the will itself and the surrounding circumstances.
2. Where, after bequeathing certain specific sums, a testatrix directed that the residue of her estate be divided into five equal parts and bequeathed one of those parts to each of five legatees or groups of legatees, it is *held* that, irrespective of whether or not such residuary legatees constitute a class, it was the intention to confine the distribution of the residue to them; and therefore, where one of such residuary legatees predeceased the testatrix, the share of such deceased legatee is not to be disposed of as intestate property, but the entire residue is to be divided among the survivors. KERWIN and VINJE, JJ., dissent.
3. Upon appeal from a judgment construing a will, where the only disputed question is fairly presented by the findings of the court below, no bill of exceptions is necessary.

APPEAL from a judgment of the circuit court for Sauk county: JAMES O'NEILL, Judge. *Reversed.*

Construction of will. On November 16, 1912, Fidelia M. Waterbury executed a will, which, omitting the signature, attestation clause, and clause appointing the executor, is as follows:

"Know all men by these presents that I, Fidelia M. Waterbury of the village of Prairie du Sac in the county of Sauk and state of Wisconsin, being of sound mind and memory and mindful of the uncertainty of human life, do make and publish and declare this my last will and testament in manner following, to wit:

"First. I give, devise and bequeath to my sister Martha M. Ried the sum of four thousand dollars ($4,000).

"Second. I give, devise and bequeath to my brother *Luman W. Stone* the sum of five hundred dollars ($500).

"Third. I give, devise and bequeath to my niece Emma A. Wakely the sum of three thousand dollars ($3,000).

"Fourth. I give, devise and bequeath to Nellie M. Wakely (daughter of my said niece Emma A. Wakely) the sum of two thousand dollars ($2,000).

"Fifth. I give, devise and bequeath to Eben Stone Wakely (son of my said niece Emma A. Wakely) the sum of two thousand dollars ($2,000).

"Sixth. I give, devise and bequeath to Hugh Davis Crawford, son of Charles Crawford and wife Bell, the sum of one thousand dollars ($1,000).

"Seventh. I give, devise and bequeath to the First Presbyterian Church of Prairie du Sac, Wisconsin, the sum of five hundred dollars ($500).

"Eighth. I give, devise and bequeath to the Sauk Prairie du Sac Cemetery Association the sum of five hundred dollars ($500), the same to be invested and the net income therefrom shall annually be used and expended, first on the proper care of the James I. Waterbury lot in said cemetery and the surplus if any shall be expended in care of the cemetery generally.

"Ninth. I hereby direct that all the rest, residue and remainder of my estate, real, personal or mixed, shall be divided into five equal shares or parts, and I give, devise and bequeath one of such shares or one fifth of all the rest, residue and remainder of my estate to my sister, Martha M. Ried, and one share or one fifth of the rest, residue and remainder of my said estate I give, devise and bequeath to the children of my deceased brother John C. Stone, and one share or one fifth of said residue I give, devise and bequeath to the children of my deceased brother Ransom E. Stone, and one share or one fifth of said remainder I give, devise and bequeath to the children of my deceased brother, Orvil Stone, and the other share or one fifth of the rest, residue or remainder of my said estate I give, devise and bequeath to my said niece Emma A. Wakely, daughter of my deceased brother, Ryland Stone."

The sister Martha predeceased the testatrix, leaving no issue, and the single question presented upon this appeal is whether by the death of Mrs. Ried, the testatrix's sister and

one of the several residuary legatees, before the death of the testatrix, the share of the residue which would otherwise have been allotted to her augmented the shares of the several other residuary legatees, or whether such share remained undisposed of by the will and was subject to be assigned as intestate property. The county court held that that part of the residue which would have been allotted to her should be divided among the remaining residuary legatees and entered judgment accordingly. The matter was appealed to the circuit court, and upon a hearing in said court the judgment of the county court was reversed and judgment entered directing the county court to assign the part which would have gone to Mrs. Ried to the heirs at law of the testatrix, Fidelia M. Waterbury. From the judgment of the circuit court the executor appeals.

For the appellant there were briefs by *William T. Kelsey* and *Olin, Butler, Stebbins & Stroud,* and oral argument by *Byron H. Stebbins.*

For the respondent there was a brief by *Grotophorst, Evans & Thomas,* and the cause was argued orally by *Evan A. Evans.*

ROSENBERRY, J. The county court and the circuit court both held that the legacy of $4,000 provided for in clause 1 of the will lapsed by reason of the death of Martha M. Ried and became a part of the residuum of the estate of the testatrix.

It does not appear how long before the death of the testatrix Martha M. Ried died. Appellant contends that the intent of the testatrix is clear; that all arbitrary rules of law devised merely as aids to the ascertainment of testamentary intent are not to be applied in cases where the intent of the testatrix can be ascertained from the instrument itself, and cites *Ohse v. Miller,* 137 Wis. 474, 119 N. W. 93; *Will of Ehlers,* 155 Wis. 46, 143 N. W. 1050; *Donges's Estate,* 103 Wis. 497, 79

N. W. 786; *Will of Boeck,* 160 Wis. 577, 152 N. W. 155; *Will of Reynolds,* 151 Wis. 375, 138 N. W. 1019.

Respondent contends that the gift to the five branches of the family named in clause 9 was not a gift to a class, but was a gift to them as individuals; that therefore the provision as to Martha M. Ried lapsed and her share passed to the heirs of Mrs. Waterbury as intestate property, one of whom was *Luman W. Stone,* respondent, named as legatee in the second clause, and cites 40 Cyc. 1473, 1474; *Fassig's Estate,* 82 Misc. 234, 143 N. Y. Supp. 494; *Matter of Kimberly,* 150 N. Y. 90, 44 N. E. 945; *Lyman v. Coolidge,* 176 Mass. 7, 56 N. E. 831; *Dresel v. King,* 198 Mass. 546, 85 N. E. 77; *Matter of Wells,* 113 N. Y. 396, 21 N. E. 137; *Workman v. Workman,* 2 Allen (84 Mass.) 472; *Claflin v. Tilton,* 141 Mass. 343, 5 N. E. 649; *Frost v. Courtis,* 167 Mass. 251, 45 N. E. 687; *Kimball v. Story,* 108 Mass. 382; *Horton v. Earle,* 162 Mass. 448, 38 N. E. 1135; *Wood v. Seaver,* 158 Mass. 411, 33 N. E. 587; *Sharpless's Estate,* 214 Pa. St. 335, 63 Atl. 884; *Parsons v. Millar,* 189 Ill. 107, 59 N. E. 606; *Mowry v. Taft,* 36 R. I. 427, 90 Atl. 815; *Murphy's Estate,* 157 Cal. 63, 106 Pac. 230; Page, Wills, § 474.

The claim of the respondent is based largely if not entirely upon the peculiar language of the ninth clause, whereby the residue is divided into five equal shares and one of these shares is assigned to each of the five legatees or groups of legatees therein named. Applying to this language the rule as stated in 40 Cyc. 1474, "where at the time of making a gift the number of beneficiaries is certain, and the share each is to receive is also certain and in no way dependent for its amount upon the number who shall survive, it is not a gift to a class, but to the individuals distributively, and this is generally held to be the case where the beneficiaries are named and their shares are certain," the respondent arrives at the conclusion that the gift of a fifth to Martha M. Ried was a gift to her individually, and, she having died before the testa-

trix, the provision for her lapsed and the share which would have gone to her should therefore be distributed as intestate property.

Rules of construction are not to be applied in ascertaining the true meaning of a will if that meaning can be ascertained clearly from the will itself and the surrounding circumstances. *Donges's Estate,* 103 Wis. 497, 79 N. W. 786. As was said by this court in *Will of Ehlers,* 155 Wis. 46, 47, 48, 143 N. W. 1050:

"Much difficulty is liable to occur in initial trials involving the construction of wills by taking some particular adjudications respecting some other wills as controlling, instead of looking to legal principles for guidance, or from following some well known rule for judicial construction as if it were applicable universally, instead of appreciating that, in general, such rules are to be used in choosing between reasonable meanings of substantial equal dignity and keeping prominently in mind that paramount to all others is the rule that the intention of the testator should prevail so far as it can be read out of the language used to express it."

Reading the will in this case in the light of all the surrounding circumstances, did the testatrix intend that in the event of the death of any legatee named in the residuary clause prior to the death of the testatrix the share of such deceased legatee should be disposed of as intestate property; or did she intend that all of the residue of her property should be divided among those named in the ninth clause, and in the event of the death of any of the residuary legatees named that the residue should be divided among those surviving?

A careful reading and study of the will convinces us that the latter was the intention of the testatrix. It was her intention to limit the amount to be received by those named in the first, second, third, fourth, fifth, and sixth clauses and not named in the ninth clause to the amounts specifically bequeathed to them, and it was not her expectation or intention that the amounts specifically bequeathed should be augmented. The fact that by the ninth clause the residuary es-

tate is divided into five equal parts, one of those parts assigned to each of the legatees or groups of persons therein named, is not inconsistent with the intention of the testatrix to confine the distribution of the residue of her estate to the persons or groups of persons named in such clause, and that is true irrespective of whether or not they constitute a class. *Will of Reynolds,* 151 Wis. 375, 138 N. W. 1019; *Ives's Estate,* 182 Mich. 699, 148 N. W. 727.

No bill of exceptions was settled. None was required. The question raised is fairly presented by the findings. In our opinion they do not support the judgment.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment in accordance with this opinion.

KERWIN, J. (*dissenting*). I cannot agree with the majority of the court in this case. The residuary clause of the will is clear and specific. It divides the residue of the estate into five equal parts or shares and one of such shares is devised and bequeathed to Martha M. Ried.

The residuary clause does not give the residue to the legatees as a class or as joint tenants. The terms of the residuary clause are clear and unmistakable that one fifth was given absolutely to Martha M. Ried, and, she having predeceased the testatrix, the bequest to her lapsed and became intestate property.

Of course, if there were anything in the will which showed a different intention on the part of the testatrix the cases cited by appellant would be in point. I find nothing in the will which would justify the construction placed upon it in the majority opinion. There is nothing in the will and surrounding circumstances from which an intent can be inferred that the residuary bequest was to a class. There is nothing in the will and surrounding circumstances from which an intent can be inferred that upon the death of Martha M. Ried before the testatrix the bequest to Martha M. Ried should go

to the other residuary legatees. An intent cannot be inferred against the plain, unambiguous terms of a will.

In addition to the cases relied upon by counsel for respondent, cited in their brief and referred to in the majority opinion, I cite the following: *Will of Allis, ante,* p. 452, 157 N. W. 548; *Ward v. Dodd,* 41 N. J. Eq. 414, 5 Atl. 650; *Hand v. Marcy,* 28 N. J. Eq. 59; *Manier v. Phelps,* 15 Abb. N. C. 123. See note collecting cases in 2 Williams, Executors, pp. 822 to 828.

I am authorized to say that Mr. Justice VINJE concurs in the foregoing dissent.

BIRDSONG & COMPANY, INC., Respondent, vs. MARTY, Appellant.

May 5—June 13, 1916.

Sales: Contract by letters, etc.: Construction: "Minimum car:" Breach by seller: Measure of damages: "Market price."

1. Letters and telegrams which passed between the parties are *held* to have constituted an unqualified contract for the sale by defendant to plaintiff of certain quantities of cheese at specified prices, and not a mere brokerage contract.
2. The term "minimum car" in a contract for the sale of goods to be shipped by rail refers to the smallest amount which will take the carload rate.
3. Where the contract was for the sale of twenty-five tubs (19,375 pounds) of one grade of cheese and enough of another grade "to make minimum car," and it appeared that 20,000 pounds of cheese constituted a minimum car, the buyer was entitled to receive one tub (775 pounds) of the second grade, it not being shown to be usual or practicable to ship a part of a tub.
4. Where title has not passed and the seller wrongfully neglects or refuses to deliver the goods, the measure of damages prescribed in sub. 3, sec. 1684*t*—67, Stats., can be applied only when there is an available market for the goods; otherwise, the measure of damages is that fixed by sub. 2 of said section.
5. Market price is the price at which goods are actually being sold

in the market at the time or times in question; and there cannot be a real market price for a commodity when there is no such commodity for sale in the market.

6. Where, upon the seller's refusal to deliver goods, the buyer was obliged to buy other goods at a higher price to fulfil his own contracts of resale, the measure of his damages, under sub. 2, sec. 1684*t*—67, was the difference between the original contract price and the price he was obliged to pay.

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Modified and affirmed.*

Action for damages for breach of contract. Plaintiff is a corporation engaged principally in the business of buying and selling cheese and other edible products, with its principal office at Philadelphia. The defendant is a maker and dealer in cheese, doing business as Jacob Marty & Company at Brodhead, Wisconsin. On July 14, 1914, plaintiff wrote the defendant a trade letter, which, among other things, contained the following statements:

"We wish to advise you that Mr. O. G. Loeliger, formerly of New York, has taken charge of our cheese department which we are just opening up and write to ask you whether you cannot work with us in Philadelphia on a consignment basis, letting us have shipment of cheese, we to carry same and sell to our buyers as they may desire. . . . And also let us know just what commission you can allow us for handling these goods and what arrangements you desire to make."

On July 16, 1914, the defendant replied, acknowledging receipt of the letter of the 14th, stating that he knew Mr. Loeliger, and continuing as follows:

"We do not wish to make any shipments on consignment, as we always have more or less trouble with this kind of business. We would be glad to send you quotations from week to week, and if you can dispose of any of our goods at the prices we make you, we will be glad to fill any orders you may send us. Of course we would be glad to have you send us orders direct from Pennsylvania, Maryland and New Jersey, and we would fill same direct to the trade at ¼c. commission."

Defendant then quoted prices and description of goods and closed with the following statement: "These above mentioned prices are all f. o. b. here, and we hope to receive some nice orders."

On August 3d plaintiff sent to the defendant an order for two tubs of Round Swiss No. 1, to be shipped to a specified customer in Philadelphia. On August 5th the defendant declined to accept the order on the ground that the party named was not a good credit risk. August 4th the plaintiff telegraphed the defendant as follows: "Can handle twenty-five tubs fancy open ripe Swiss sixteen wire." Later in the day of August 4th plaintiff telegraphed defendant: "Wire lowest price twenty-five tubs Round Swiss Number One ripe." On August 4th, in reply to plaintiff's telegram, defendant telegraphed plaintiff: "Sixteen one-half for twenty-five fancy open Swiss. Wire acceptance." On the same day the plaintiff wired defendant as follows: "Accept twenty-five tubs fancy open ripe Swiss sixteen one-half. Ship immediately." On August 5th plaintiff wrote defendant confirming telegraphic order as follows: "We wired you last evening as per inclosed copy, accepting 25 tubs of fancy open ripe Swiss at 16½c. for immediate shipment and trust you will get these off to us as promptly as possible and of your usual good quality." On the same date defendant wrote plaintiff confirming transaction had by telegraph as follows: "We have your wire stating that you accept the twenty-five tubs at 16½c. for immediate shipment and we will do our best to get this order off as soon as possible. You may have to wait perhaps a week before we ship same, as we are just getting in the June Swiss, a few tubs from different factories, but as stated before we will send them along as soon as possible."

On August 5th plaintiff telegraphed defendant as follows: "Increase our order to minimum car as your yesterday's message." In response to which message defendant telegraphed as follows: "Sold out at present with fancy Swiss. Offer you good sound number two at thirteen to make minimum car."

Replying to this plaintiff telegraphed defendant on the same date: "Complete minimum car with twos per your wire. Rush." On August 6th plaintiff wrote defendant as follows: "We confirm our telegram to you as per inclosed copy and regret that you could not furnish further quantities of fancy goods from you, but to complete car with twenty-five tubs we have already ordered from you, we would ask you to ship the number twos at 13c. to make minimum car." On August 7th defendant wrote plaintiff as follows: "We have your wire of the 6th inst., which reads as follows: 'Complete minimum car with twos per your wire. Rush.' In regard to this wire, will say that we will book you for enough No. 2 Swiss to make out a minimum car." On the same date plaintiff wrote defendant: "We acknowledge receipt of your favor of August 5th, and would ask you to kindly rush shipment of cheese as we are in need of same," and giving other directions not material here.

On August 17, 1914, plaintiff telegraphed defendant: "Have you shipped car, if not ship immediately, buyers anxious." They followed this telegram with a letter on August 17th: "We have wired you today as per inclosed copy inasmuch as we have had no invoice or bill of lading from you on cheese purchased. Our buyers are getting very anxious for same, and if you have not already shipped kindly give this your immediate attention and get same off at once."

On August 17th, and apparently in response to the telegram of that date from the plaintiff, defendant wrote plaintiff as follows:

"In regard to order for Swiss cheese which you sent us, will say that we will be unable to take care of this order, as it is impossible for us to get the goods. When you sent this order in we bought the goods from the company factories in this vicinity, but when the time came to deliver the cheese they would not send it in and are holding all of the Swiss for a higher price. All of the dealers are canceling orders on this account.

"We regret very much in having to cancel this order, but as

mentioned above we cannot make shipment when we cannot buy the cheese."

The defendant's letter of August 17th was received by plaintiff on August 19th. Upon receipt thereof plaintiff telegraphed defendant as follows:

"Letter received. Will not accept your cancellation. Have sold cheese our buyers' strength your confirmation buyers insisting deliveries we must insist upon you shipping car immediately in order save expensive claims against you for nondelivery we advise you work quick make immediate shipment answer when will car go forward."

On the same date plaintiff wrote defendant to substantially the same effect. On August 26th and 27th plaintiff wrote and telegraphed defendant insisting upon delivery. To these letters and telegrams the plaintiff received no reply until September 8th, when defendant wrote plaintiff as follows:

"In answer to your telegram and several letters, wish to advise that we have finally made settlement with the farmers with whom we had bargained for about three hundred tubs of June Swiss about the time the war in Europe broke out. At the time the war started dealers from the East and from New York came through this section and paid as high as 18c. and 20c. This caused the farmers with whom we had dealings to back out on us. Now we have several factories ourselves which are paid on a company basis, and therefore at the time it was impossible for us to deliver the goods to you."

This letter contained some other suggestions and statements in regard to the controversy between the parties, which are not material here.

By letter dated September 11, 1914, plaintiff made demand upon the defendant for settlement under the contract in accordance with the following statement:

1 carload Swiss cheese, 60 tubs.			
No. 1 25 tubs at 650 lbs. each.....	16,250	3½c.	$568 75
No. 2 35 tubs at 650 lbs. each.....	22,750	4c.	910 00
As we bought only 10 tubs at 20c. we have to buy 15 tubs more at 23c.			
15 tubs at 650 lbs.....	9,750	3c.	292 50
			$1,771 25

Defendant declined to make an adjustment, with the result that plaintiff brought this action to enforce its claim for damages. The case was tried before the court without a jury. The trial court held that the correspondence constituted an unqualified contract of purchase and sale, by which the plaintiff purchased of the defendant twenty-five tubs of No. 1 cheese at 16½ cents a pound, and a sufficient amount of No. 2 at 13 cents to make a minimum carload; that a minimum east-bound car contains 20,000 pounds; that the average weight of a tub of Swiss cheese in August is approximately 775 pounds, and that the contract therefore called for 19,375 pounds of No. 1 and 625 pounds of No. 2; that at Brodhead and in southern Wisconsin generally the market price on August 17 was 17½ cents to 18 cents for No. 1 and 15½ cents for No. 2; that at the time plaintiff received defendant's letter canceling the contract the price had advanced to 20 cents for No. 1 and 16½ cents for No. 2; and plaintiff had judgment accordingly for $700. From such judgment defendant appeals.

E. D. McGowan, for the appellant.

For the respondent there was a brief by *Jeffris, Mouat, Oestreich & Avery,* and oral argument by *L. A. Avery.*

ROSENBERRY, J. The defendant claims that the relation between the plaintiff and the defendant was that of principal and broker and not that of buyer and seller; that under all the facts and circumstances plaintiff was in good faith bound to advise the defendant of the changed condition of the market due to the declaration of war in Europe; that there was no contract between the parties for the purchase and sale of the cheese; that the date as of which the damages should be determined is August 17th, the day on which the defendant wrote the letter canceling plaintiff's order, and not August 19th, the day on which the letter was received by plaintiff.

Plaintiff excepted to the finding of the court as to the amount of damages and asked for a review and modification

of the judgment under the provisions of ch. 219, Laws 1915 (sec. 3049*a*, Stats. 1915).

We think the trial court was right in finding that the relation which existed between the plaintiff and the defendant was that of buyer and seller and not that of principal and broker. Defendant's letter of July 16th seems to set this question absolutely at rest. Defendant says: "We do not wish to make any shipments on consignment, as we always have more or less trouble with this kind of business." But even if this were not true, the transaction between the plaintiff and the defendant, commencing with the telegram of the plaintiff dated August 3d and closing with defendant's letter of August 7th, constituted a contract for the sale and purchase of goods as found by the court. The defendant breached his contract under a mistaken idea that he had a right to do so for the reason that "so long as you pay no money down on any contract the contract is not lawful."

The only question remaining is that relating to the measure of damages. The defendant having refused to deliver the goods and the title thereto not having passed to the plaintiff, the measure of damages, in harmony with the decisions of this court, is stated by the Uniform Sales Act as follows:

"Section 1684*t*—67. 1. Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for nondelivery.

"2. The measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract.

"3. Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver."

The court found the market price on August 19th, the day the plaintiff received the defendant's letter in which the de-

fendant stated that he would not deliver the goods, to be for No. 1 cheese 20 cents a pound, and for No. 2 16½ cents a pound, and found that the amount designated in the telegram was twenty-five tubs of No. 1 and just enough No. 2 to make 20,000 pounds. This would require the shipment of a part of a tub, which is not shown to be usual or practicable. Plaintiff claims that it was entitled to receive twenty-five tubs of No. 1 and five tubs of No. 2, basing the claim upon the statement made by the defendant at the trial that that was what he would have shipped had he filled the order.

Defendant's proposition was: "Offer you good sound number two at thirteen to make minimum car." To which plaintiff replied: "Complete minimum car with twos per your wire." The term "minimum car" refers to the smallest amount of the specified article which will take the carload rate, and is shown in this case to be 20,000 pounds on cheese east bound. Under the terms of this contract we think that plaintiff would not have been required to accept more than the amount stated. Plaintiff therefore was entitled to receive 19,375 pounds of No. 1 and one tub of No. 2 to make out a carload lot, or 775 pounds of No. 2.

While the trial court found the market price, it appears from all the evidence without dispute that there was in fact no market for cheese in or about Brodhead, the place of delivery, or in or near southern Wisconsin, in the latter part of August, 1914. The defendant himself testified:

"On account of the war you know we simply had no market price through our section in the Swiss cheese." "The farmers got hold of theirs and they would not sell at any price, and some that had sold it backed out on it." "We could not get any what we had bought." "For ten days or two weeks you could not get it at any price, no matter what you offered."

Another witness testified: "There wasn't practically any market there. It was in such a fluctuating state," and the testimony of all of the other witnesses is substantially to the same effect. There was some evidence as to deliveries made during the latter part of the month, mostly on orders taken

earlier, but a careful examination of the evidence shows that there was no market at the time and hence there could be no market price. Market price is not an imaginary, fictitious thing, but is the price at which goods are actually being sold in the market at the time or times in question.

The burden was upon the plaintiff to establish the amount of its damages. This it did by showing that there was no available market in which the cheese could be purchased and that it was obliged to pay for 6,500 pounds of No. 1 cheese 20 cents a pound, and for 12,875 pounds of No. 1 cheese 23 cents a pound, in order to fill contracts which it had made with its customers. This made a *prima facie* case for the plaintiff. If the damages could have been minimized by purchase of the cheese in the open market, the burden was then upon the defendant to show that there was such an available market in which the goods could have been purchased. As has been said by this court, "The idea that there can be a real, substantial market price for a given commodity, when there is no such commodity for sale in the market, is absurd." *Cockburn v. Ashland L. Co.* 54 Wis. 619, 12 N. W. 49. The defendant in this case made no such showing, and, as has been pointed out, it was, on the contrary, established that no market existed.

The trial court therefore was in error in assessing the damages at the difference between the contract price and the so-called market price. The rule stated in sub. 3, sec. 1684*t*—67, Stats., can only be applied under the conditions therein prescribed. In other cases where the property in the goods has not passed to the buyer, and the seller refuses to deliver the goods, the rule laid down in sub. 2 establishes the measure of damages, which is the loss directly and naturally resulting in the ordinary course of events, from the seller's breach of the contract. *Cockburn v. Ashland L. Co., supra; Foss v. Heineman,* 144 Wis. 146, 128 N. W. 881.

The evidence in this case shows that the plaintiff purchased 6,500 pounds of No. 1 cheese at 20 cents, and was

obliged to pay for the remainder, 12,875 pounds, 23 cents a pound, and that the lowest price quoted for 775 pounds of No. 2 was 17 cents a pound. It does not clearly appear whether plaintiff purchased the 775 pounds at that price or not, but he might have done so. On this basis the plaintiff was entitled to judgment for the sum of $1,095.37, with interest from August 19, 1914.

By the Court.—The judgment appealed from should be modified as stated in the opinion, and as so modified it is affirmed with costs to the respondent.

RINDER, County Treasurer, Respondent, vs. CITY OF MADISON and others, Appellants.

May 6—June 13, 1916.

Constitutional law: Highways and bridges: Highway district: Taxation: County system: Classification of highways: Exclusion of city streets: County committee: Delegation of powers of county board and clerk: Auditing of claims: County commissioner: City treasurer: Failure to settle taxes: Penalty.

1. The provisions of secs. 1317*m*—1 to 1317*m*—15, Stats. 1915, establishing the county as the highway district and imposing burdens on the taxable property therein for defraying the cost of improving and maintaining the highways of the county system, are valid, the law being general and operating uniformly throughout the state and upon the residents within each county.
2. The exclusion of city streets from the county system of highways, while town highways and connecting streets in villages may be included therein, is within the power of the legislature, and does not unreasonably discriminate against the rights of the residents of cities or deprive them of the equal protection of the laws. It does not affect the political rights of city residents differently than those of other residents of the counties in localities where the local highways are not made a part of the system.
3. The classification of highways so made is legitimate; it is not arbitrary, but is based upon peculiar conditions in respect to

construction, improvement, and use, which distinguish city streets from the highways in towns and villages.

4. Sub. 8, sec. 1317*m*—5, does not unlawfully delegate to the county committee therein provided for constitutional powers or authority of the county board or county clerk—the powers and duties of the committee being administrative only.
5. Par. (3) (e) of said sub. 8, making it the duty of said county committee to "audit," together with the county clerk, claims for services and material, is not to be interpreted as abrogating the duties imposed by law on county clerks, or as giving the committee the ultimate power to allow or disallow such claims.
6. The authority given to the county highway commissioner by sub. 3, sec. 1317*m*—7, does not conflict with the authority of the county board to audit and determine the validity of claims, nor does that subsection repeal the laws in force at the time of its adoption as to the powers and duties of the county board and county clerk respecting claims against the county.
7. The property in a city which is required by law to maintain its own bridges is not taxable, under sec. 1319, Stats., for the building of bridges in towns.
8. The five per cent. penalty provided for in sec. 1117, Stats., for failure of a town, city, or village treasurer to make settlement of the taxes included in his tax roll, is to be imposed for failure to perform official duties, but should not be imposed upon a city treasurer who had collected the tax levied for the county highway fund and was ready to settle with the county treasurer within the time required by law, but was directed by the common council to retain the money until the validity of the law authorizing the tax had been tested in legal proceedings—the constitutional questions involved being of sufficient gravity to justify him in obeying such direction.

APPEAL from a judgment of the circuit court for Dane county: A. H. REID, Judge. *Modified and affirmed.*

The action is brought by the plaintiff as county treasurer of Dane county against the defendants upon the bond of the city treasurer furnished to the county treasurer and conditioned for the payment of the county and state taxes.

The plaintiff is and was county treasurer and the defendant *Carl Moe* is and was city treasurer and the other individual defendants are the bondsmen of the city treasurer. The city of *Madison* is a municipal corporation having no prospective

state highways within its corporate limits. At the annual meeting of the county board of Dane county in November, 1915, a tax of eight tenths of a mill was levied upon all the taxable property in Dane county for the county highway fund, which tax amounted to $129,658.15. Of this amount there was apportioned and certified by the county clerk to the city of *Madison* the sum of $47,110.58, which was required to be raised by the city of *Madison* for county highway improvements. This sum was levied by the city of *Madison* and the city treasurer collected and now has such sum in his possession. He was directed by the common council not to pay it to the county treasurer. Of the $129,658.15 levied by the county board of Dane county as aforesaid the sum of $16,000 was levied for county bridge aid, petitions for which were properly filed and the proper proceedings taken under sec. 1319, Stats. The sum of $47,110.58 apportioned to the city of *Madison* for the county highway improvement includes $5,813.51 of this tax for building bridges. After deducting this sum there remains a balance of $41,297.07 as the proper amount apportionable to the city of *Madison* under the state aid highway law.

The circuit court held that the county board had no right to levy the tax of $5,813.51 on the city of *Madison* for the purpose of building county bridges, and that the tax of $41,297.07 was properly levied as the city's portion of the county highway fund pursuant to the state aid highway law, and judgment was entered in favor of the plaintiff in the sum of $41,297.07 with interest at the rate of ten per cent. per annum and a penalty of five per cent. for withholding payment of this tax after it was demanded. From such judgment this appeal is taken.

For the appellants *City of Madison* and *Carl Moe,* city treasurer, there was a brief by *William Ryan,* city attorney, and there was also a brief on behalf of the *City* by *Frank W. Lucas,* member of the common council and counsel for the

City; and the cause was argued orally by *Mr. Ryan, Mr. Lucas,* and *Mr. William R. Bagley.*

Harry Sauthoff, district attorney, for the respondent.

There was also a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, as *amici curiæ,* and oral argument by *Mr. Gilman.*

SIEBECKER, J. The city of *Madison* and its treasurer claim in justification of the refusal to pay the county the sum of $41,297.07 collected by the city and now in the treasurer's possession as a tax on the taxable property of the city that parts of the provisions of secs. 1317*m*—1 to 1317*m*—15, Stats., under which the tax was levied by the county, are in conflict with the state constitution and therefore void. This tax was collected pursuant to a levy of the Dane county board to raise a county highway fund under the provisions of this law. It appears that this amount had been apportioned and certified by the county clerk as the city's share of such county tax. The city of *Madison* does not question that the exertion by the county of its taxing power was for the public purpose of providing and maintaining a system of county highways for public travel. It is however contended by the defendants that the parts of the statutes creating the county highway system which provide that the system "shall begin at the corporate limits of the county seat and of the various market towns and railroad stations of the county and include the main traveled highways leading into each town in the county," and that the county board shall add to this system "such streets in incorporated villages as directly connect the ends of roads then on said system, and such streets when so added, . . . shall become a part" of this county highway system (par. (a), (b), sub. 1, sec. 1317*m*—3), constitute an arbitrary classification of highways, resulting in unreasonable discrimination against the rights of the people in such cities, and depriving them of the equal protection of the law. The

argument is made that the exclusion of city streets from the county system of highways deprives city residents, as an integral part of the county taxing district, from receiving the benefits of the taxes imposed on them for highway improvements and confers the benefit of such tax on the residents of towns and villages, and thus subjects them to a system of taxation that violates the rule of uniformity guaranteed by the constitution and deprives them of the equal protection of the law in bearing the burdens of taxation.

If the selection of highways for the county system is a proper classification within the constitutional powers of the legislature, then no constitutional infirmity is apparent in the legislation here assailed. The scope of the legislative power to deal with the subject of establishing taxing districts for the maintenance and improvement of the highways in the state is exemplified by the legislation embodied in the statutes of this state and by the various cases where such legislation has been assailed as an improper exercise of this power shown by the recorded decisions of this court on the subject. Discussion of the questions here involved could add nothing to the full elaboration of them in former decisions of this court and we therefore deem it sufficient to reiterate in part what has been said by this court on the subject. In *Land, L. & L. Co. v. Brown,* 73 Wis. 294, 303, 40 N. W. 482, Mr. Justice TAYLOR, speaking for the court, declares:

"If a rule for taxation should be adopted which limits the right of taxation for public improvements to such property only as it can be shown is directly benefited by such improvement, it would result in endless confusion and litigation, and render void very many acts for the government of towns and counties. . . . It is for the legislature to fix the limits of the taxing district, and not for the courts. . . . This court has affirmed the validity of the law concerning the building of bridges, which compels the whole county to contribute to the building of a bridge in one town, and that without regard to the question whether the bridge to be built would be any direct benefit to any other town in the county."

The court also states that no rule of public policy forbids taxation of property for any public purpose which may not directly benefit such property, "and that the justice or injustice of the limits of the taxing district, when fixed by the legislature or some other authority authorized by law to fix the same, cannot be questioned by the courts." In *Jensen v. Polk Co.* 47 Wis. 298, 2 N. W. 320, it was declared:

"The legislature must in all cases determine by law what locality or division of the state shall be burdened with the expenses of opening and repairing highways. . . . There can be no doubt as to the power of the legislature to compel the several counties of the state, by general law, to open and work the state roads laid out and located within their respective boundaries; and unless there be some clause of the constitution which expressly prohibits it, the power to do so as to a particular road in a particular county is equally clear."

Other cases in this court affirming legislative competency to deal with this class of public improvement adhere to the doctrine that the legislature has power to compel the levy of taxes for such purpose by towns, counties, cities, and villages. This was emphasized in *State ex rel. Baraboo v. Sauk Co.* 70 Wis. 485, 36 N. W. 396, and was there justified on the ground that

"Highways and bridges are matters of general concern to the people of the whole state; yet the expense of making them, and of keeping them in repair, is generally thrown upon the localities where they are situated. Perhaps this is as fair a rule for apportioning the burden as could be devised; still it oftentimes results in making the property in one taxing district contribute more to the same public purpose than the property in another district. . . . The constitution should not be so construed as to prevent the legislature from distributing an exceptional burden over a larger taxing district unless such construction is absolutely demanded by its language."

The court in this case held a law valid which compelled a county to levy a tax upon the taxable property of the county

except the property exempted in cities and villages maintaining their own bridges, to pay one half of the cost of a bridge in one town of the county. See, also, *Battles v. Doll,* 113 Wis. 357, 89 N. W. 187; *Bloomer v. Bloomer,* 128 Wis. 297, 107 N. W. 974; *Chicago & N. W. R. Co. v. State,* 128 Wis. 553, 108 N. W. 557; *State ex rel. Carey v. Ballard,* 158 Wis. 251, 148 N. W. 1090; *Alexander v. McInnis,* 129 Minn. 165, 151 N. W. 899; *Chicago, R. I. & P. R. Co. v. Murphy,* 106 Iowa, 43, 75 N. W. 680. It is manifest from these adjudications that the provisions of secs. 1317*m*—1 to 1317*m*—15, Stats. 1915, establishing the county as the highway district and imposing the burdens on the taxable property therein for defraying the cost of improvement and maintenance of the system of county highways, are a proper exertion of the legislative power. It is a general law operating uniformly throughout the state and upon the residents within each county. The alleged injustice to residents of cities by compelling them to contribute to the improvement of highways located outside of their municipal territory presents no constitutional objections, and if actual inequalities of burdens result that is a subject for legislative consideration. We discover nothing in the provisions of these statutes excluding city streets from the system of county highways that affects the political rights of city residents differently than those of other residents of the counties who may perchance reside in localities where the local highways are not made a part of the system. The argument of defendants seems to assume that cities as municipal corporations have special rights, as such, that are invaded. Towns, villages, and cities may be united into a single highway district, as above shown, and when so united constitute a political subdivision of the state for that purpose, and if the laws governing them operate generally and uniformly throughout the district there is no invasion of the constitutional rights of the different local governments. It is strenuously argued that there is no distinction between streets

in cities and villages in relation to the county highway system, and hence exclusion of the highways of one and inclusion of those of the other is false classification, because the public purpose of improving the highways of the state reasonably requires that no distinction be made between these localities. The distinctions between cities and villages in their corporate political and governmental conditions have often been adverted to in the decisions. In *State v. Evans,* 130 Wis. 381, 110 N. W. 241, Mr. Justice DODGE, after referring to a number of such decisions, states:

"That there are distinctions between large and dense communities and small and sparser ones as separate classes is, of course, obvious. That such differences are germane and relative to some purposes of legislation has been declared, almost without limit, by courts. *Smith v. Burlington,* 129 Wis. 336, 109 N. W. 79, and cases there cited. . . . As to the cogency or propriety of either the regulations made or of the importance of the distinctions, as we have so often said, the courts have little concern. Those subjects rest with the legislature, and only when the court, in the exercise of the utmost deference toward that other branch of the government, is compelled to say that no one in the exercise of human reason and discretion could honestly reach a conclusion that distinctions exist having any relation to the purpose and policy of the legislation, can it deny it validity" (citing).

The case proceeds to point out the many distinctions between urban and rural communities which are proper considerations for legislative discretion in exercising the lawmaking power in behalf of each class. And so here the peculiar conditions that are necessarily incident to and distinguish the construction, improvement, and use of city streets from the construction, improvement, and use of town and village roads and streets are so marked and varied that they present a legislative question in deciding whether or not it would be practicable and feasible to include city streets as a part of the system of county highways contemplated by this law. We are convinced that the conditions and uses of city streets as compared

with the town and village highways present a proper subject for legislative discretion concerning the desirability and practicability of uniting them into one system of county highways, and that the legislature did not transgress its power in this respect.

Another consideration urged by defendants is that the provisions of sub. 8, sec. 1317*m*—5, Stats. 1915, creating a committee to be elected or appointed by the county board to act with the state highway commission and the county commissioner in the administration of the law, are invalid. The powers and duties of this committee are specifically prescribed. It is contended that this subsection delegates powers and authority to such committee which are conferred by the constitution on county boards and county clerks. These powers and duties of this committee are clearly administrative in their nature and in no way conflict with the duties imposed by law on county clerks. The committee can only carry out the road improvement authorized by the county board and perform administrative features connected therewith. It is suggested that they have the ultimate power to pass on the legality of claims for services and material furnished for the construction of roads and bridges. The duty to "audit" such claims as provided by par. (3)(e) of this subsection is not to be interpreted as abrogating the duties imposed by law on county clerks, nor is it to be considered that such "audit" implies that the committee is given power to finally pass on the allowance or disallowance of claims against the county. It is evident that their duties under this part of the act are to examine claims to ascertain whether or not they pertain to and properly itemize the charges for material furnished and work done, and to check the items as to their correctness in these respects to assist the county clerk and the county board to determine whether they are just and legal claims. We think the authority of the county highway commissioner under sub. 3, sec. 1317*m*—7, Stats., does not conflict with the authority

of the county board to audit and determine the validity of claims paid by the commissioner in the prosecution of the work authorized by the county, and that these provisions do not repeal the laws in force when this section was adopted, respecting the authority vested in the county board and county clerk prescribing their duties pertaining to claims against the county.

The judgment appealed from correctly excluded recovery of the sum of $5,813.51 as taxes levied for county aid to the building of bridges in towns pursuant to the provisions of sec. 1319, Stats. The trial court awarded recovery of $41,297.07 and imposed a five per cent. penalty on this amount under sec. 1117, Stats. 1915, upon the authority of *Oneida Co. v. Tibbits,* 125 Wis. 9, 102 N. W. 897. In the *Tibbits Case* the town treasurer, through his failure to collect the town tax as required of him, was unable to make settlement of the taxes included in his tax roll within the time required by law and hence he was subjected to the five per cent. damages provided by this section. It is manifest from the provisions of this section that these penalties are imposed on the treasurer for official delinquencies resulting from his failure to perform the duties imposed on him by the law. The defendant *Carl Moe,* as city treasurer, had performed the duties of collecting this tax and was ready to settle with the county treasurer for the tax within the time required by law, but was directed by the common council of the city to retain this money until the validity of the law authorizing the tax had been tested in legal proceedings. The challenged legislation involved constitutional questions of sufficient gravity to justify the treasurer in obeying the direction of the common council. Under these circumstances it cannot be reasonably said that the city treasurer has failed to perform his official duties within the requirement of sec. 1117, Stats. 1915. To hold otherwise would penalize the treasurer for obeying the commands of the common council and for protecting himself and his bondsmen

against a possible liability for the whole tax, if the courts found it to be invalid. Under these circumstances and conditions it must be held that the city treasurer is not subject to the penalty provided by sec. 1117. From this it follows that the court erred in awarding recovery of five per cent. damages on the amount due the county. The judgment must be modified by deducting therefrom the sum of $2,064.85, and as so modified the judgment is affirmed.

By the Court.—It is so ordered.

WELCH, Respondent, vs. DUNNING, Appellant.

May 23—June 13, 1916.

False representations: Sale of tubercular cattle: Evidence: Sufficiency: Competency: Special verdict: Findings construed: Inconsistency: Pleading: Law of another state: Measure of damages.

1. Findings by the jury to the effect that defendant knowingly made false representations as to the health of cattle sold by him to plaintiff and as to their having been tested for tuberculosis, are *held* to be sustained by the evidence.
2. The jury answered affirmatively the first two questions in the special verdict, as to representations made by defendant. Question 3 was: "If you answer questions 1 and 2 or either of them Yes, was such representation false?" This was answered Yes. *Held*, that the jury thereby found that the representations referred to in questions 1 and 2 were both false.
3. Where two findings in a special verdict are inconsistent, and but one of them has support in the evidence, the other may be disregarded.
4. If not pleaded, the law of another state is not admissible in evidence.
5. For the purpose of showing that defendant knew that cattle shipped by him to plaintiff were not healthy, it was competent to prove that he had had trouble in previous recent shipments of cattle on account of their having tuberculosis.
6. For false representations as to health of cattle sold and shipped by defendant to plaintiff in Dakota, the latter was entitled to

recover the difference between their value if they had been as represented and their value in the condition in which they were when in plaintiff's possession in Dakota; also the sums reasonably expended in railway travel and in transporting the cattle to Dakota, in caring for them on the way and while they were still under plaintiff's care in Dakota, together with the amount necessarily expended in testing the cattle, destroying their carcasses, and disinfecting the buildings in which they had been kept.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action to recover damages for fraud in the sale of cattle. About March 2, 1914, plaintiff, a resident of Grafton, North Dakota, purchased fifty-six head of cattle of the defendant, a resident of Hebron, Illinois. Plaintiff's claims are, in substance, that defendant represented the cattle to be healthy and that he would furnish plaintiff with a certificate of examination by veterinarians authorized by the state of Wisconsin to administer the tuberculosis test showing that the cattle purchased had been tested in conformity with the laws and regulations of the state of Wisconsin within thirty days prior to date of shipment; that the plaintiff relied upon such representations in purchasing the cattle; that such representations were false to the knowledge of defendant; that certificates of inspection bearing false dates showing inspection within thirty days of shipment were furnished, when in fact most of the cattle had not been inspected within thirty days, and that shortly after the cattle arrived at Grafton eleven of them were condemned by the state live stock sanitary board of North Dakota by reason of their being infected with tuberculosis, and that thirty-two head were shipped to South St. Paul for slaughter because believed to be infected, all to the plaintiff's damage in the sum of $2,054.60.

The jury found (1) that the defendant represented to the plaintiff before the purchase of the cattle that they were free from any infection of bovine tuberculosis; (2) that the defend-

ant represented to the plaintiff before the purchase of the cattle that they had been tested with the Wisconsin tubercular test within thirty days prior to their shipment to North Dakota; (3) that both such representations were false; (4) that the defendant knew they were false at the time he made them; (5) that he ought to have known they were false at the time he made them; (6) that he made such representations recklessly and with no knowledge on the subject; (7) that he made them for the purpose of inducing plaintiff to purchase the cattle; (8) that plaintiff believed such representations to be true when he purchased the cattle, and that he was induced to purchase the cattle by his belief in and reliance upon such representations; (9) that plaintiff ought not to have discovered the falsity of such representations by the exercise of ordinary care and prudence under all the circumstances known to him; (10) that the defendant represented to the plaintiff, before the purchase of the cattle, that he would furnish certificates of health showing that the cattle had been tested with the Wisconsin tubercular test within thirty days prior to their shipment to North Dakota; (11) that plaintiff relied upon such representation and was induced thereby to purchase the cattle; (12) that in the exercise of ordinary care and prudence the plaintiff ought to have relied upon the representation that the defendant would furnish such certificates; (13) that the defendant knowingly and with intent to cheat and defraud the plaintiff caused to be furnished false certificates of health to accompany the shipment of cattle, for the purpose of misleading the plaintiff as to the actual dates upon which the cattle were in fact tested; (14) that the defendant caused such certificates to be furnished for the purpose of inducing the plaintiff to purchase the cattle; (15) that the plaintiff was misled by the dates appearing upon said certificates and thereby induced to purchase or retain the cattle; (16) that plaintiff in the exercise of ordinary care and prudence ought to have relied upon the statements made in the certificates furnished

that the cattle were tested upon the dates therein given, or upon any particular dates; and (17) damages in the sum of $1,851.

The court entered judgment upon the verdict in favor of the plaintiff, and the defendant appealed.

For the appellant there were briefs by *Vroman Mason*, attorney, and *David R. Joslyn*, of counsel, and oral argument by *Mr. Mason*.

For the respondent there was a brief by *Gilbert & Ela*, and oral argument by *Emerson Ela* and *F. L. Gilbert*.

VINJE, J. Defendant makes a strong argument claiming that the findings of the jury to the effect that he knowingly made false representations as to the health of the cattle and their having been tested according to the Wisconsin law are not sustained by the evidence. We have carefully examined the same and have reached the conclusion that they find support in the evidence. The representation that they were healthy is found upon conflicting evidence, the plaintiff testifying that such representation was made and the defendant denying it. Evidently the jury believed the plaintiff. There is no dispute but that the certificates of inspection furnished were false to the knowledge of the defendant. They did not come into the hands of the plaintiff till after the contract was closed and the cattle shipped. Neither did the slips showing individual inspection come into his hands until the cattle were shipped. He was therefore without any knowledge or means of knowledge as to the falsity of the certificates till after he had received the cattle and shipped them.

Question numbered 3 read: "If you answer questions 1 and 2 or either of them Yes, was such representation false?" The jury answered both questions 1 and 2 Yes, and also question 3 Yes. The only reasonable construction that can be given to question 3 and its answer is that the jury found that the representations made in both questions 1 and 2 were false.

It is evident that the answer to question 6 is inconsistent with the answer to question 4, but the record clearly shows that the answer to question 4 finds support in the evidence while the answer to question 6 does not, so its answer may be disregarded.

Defendant claims the law of Illinois governs the case. Since the jury's findings that the defendant knowingly made false representations as to the health of the cattle and certificates to be furnished are sustained by the evidence, it becomes immaterial whether the case falls under the law of Illinois, which it is claimed requires knowledge of the falsity of the representations made in order to incur liability, or under the laws of this state. Moreover, the law of Illinois in this respect was not pleaded and was therefore not admissible in evidence. *White v. M., St. P. & S. S. M. R. Co.* 147 Wis. 141, 133 N. W. 148.

Evidence was received over objection of defendant to the effect that he had had trouble in previous recent shipments of cattle on account of their having tuberculosis. The evidence was received for the purpose of showing knowledge on his part that his cattle were not healthy. It was competent upon that subject.

It is claimed that the damages found are excessive. Upon the question of damages the court instructed the jury as follows:

"In considering what shall be your answer to this question you will first consider the sum which you find from the evidence is the difference between the two sums; the first sum is the fair and reasonable value of the cattle here in question if they had been in the condition which you find *Mr. Dunning* represented them to be, if you find he made such representations; the second sum is the fair and reasonable value of these same cattle in the condition in which you find them to have been at the time they were in *Mr. Welch's* possession in North Dakota; the difference between these two sums is the first element you will have to consider in answering this last question.

Other elements that you will have to consider are such sums as you find were reasonably and necessarily expended in railway travel and in transporting these cattle to Dakota, in caring for them on the way and while they were still under the care of *Mr. Welch* in Dakota, together with such sum as will reasonably and necessarily measure the amount expended in testing these cattle, destroying their carcasses, and disinfecting the buildings in which they had been kept. Whatever sum will measure all these elements fairly and reasonably, that sum will be your answer to this last question."

The charge correctly stated the law and the evidence supports the award made.

Defendant's other assignments of error are deemed not well taken. The case is one presenting practically only questions of fact for adjudication. Hence, when those are found by the jury there remains only the task of ascertaining whether or not they have sufficient support in the evidence to sustain them.

By the Court.—Judgment affirmed.

VAN BRUNT, Respondent, vs. FERGUSON and another, imp., Appellants.

May 23—June 13, 1916.

Reformation of instruments: Mutual mistake: Deed creating charitable trust: Delay: Parties.

1. A deed establishing a charitable trust, which by mutual mistake does not express the real meaning of the parties, may be reformed in a proper case if the necessary parties are before the court.
2. Even the lapse of years should not preclude the correction of such a mistake, where the delay is satisfactorily explained and no rights of third persons have intervened.
3. Thus, where the owner of land conveyed it to the trustees of the Wisconsin Consistory (a Masonic body) for the purpose of laying a foundation for a Masonic home for all needy Master Ma-

sons and their families, and that was the understanding of the Consistory and its officers, but by mistake the deed, which was drawn by one of said trustees and executed and recorded without careful examination then or for eight years thereafter by either party, contained conditions inconsistent with their intention and understanding, such mistake is corrected, in a suit by the grantor, by reforming the deed so as to make it express the original understanding—the delay being sufficiently explained, no rights of third persons having intervened, and the necessary parties (including the original grantees, the corporation at present holding the title, the present trustees of the Consistory, a sufficient representation, under sec. 2604, Stats., of the 2,700 members of the Consistory, and all the present beneficiaries of the charity) being before the court.

APPEAL from a judgment of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

This is an equitable action to reform a trust deed of real estate made by the plaintiff to the trustees of the Wisconsin Consistory (a Masonic body) in November, 1905, for charitable purposes, on the ground of mutual mistake. From a judgment reforming the deed as prayed two of the present beneficiaries of the trust appeal.

There is little dispute as to the essential facts. The plaintiff is and was at the time of the execution of the deed a Master Mason. He owned a farm of 319 acres with buildings near Dousman in Waukesha county worth about $45,000. He conceived the purpose of deeding this farm in perpetual trust to some Masonic organization for the purpose of furnishing a home for indigent Masons and their families. *Mr. Van Brunt* was at that time a member of the Wisconsin Consistory, which is a body of Masons who have passed thirty-two degrees of inspection. At the time of the execution of the deed there were over 21,000 Master Masons in Wisconsin and only 1,400 members of the Consistory. The plaintiff's idea was that this proposed charitable trust might well be administered by the Consistory, and after some written communications (in which the purpose to make a home for all aged

and indigent Master Masons in good standing is very clearly expressed) he executed a deed of the farm November 23, 1905, to Thomas E. Balding, Luther L. Caufy, and Thomas J. Pereles as trustees of the Wisconsin Consistory and their successors as such trustees, subject to certain conditions or trusts. The first condition authorized the grantees to convey the premises to a corporation to be thereafter formed, composed of Consistory members, for the purpose of carrying out the purposes of the trust, until which time the trustees should perform the duties of the trust. The second and third conditions of the deed were as follows:

"Second. That said premises are conveyed by said party of the first part, and accepted by said party of the second part, upon condition that the same shall be held, used and occupied for the purpose of Masonic charity in such form and subject to such rules and regulations as said trustees, their successors and assigns, or said corporation hereinbefore mentioned, shall from time to time make.

"This condition shall not prevent the said party of the second part, its successors or assigns, to receive or accept gifts, contributions, or nominal compensations in special cases, whether the same comes from members of the Consistory or other Masonic bodies. Nor shall it prevent any members of the Consistory to provide for themselves a home on any portion of said premises; nor prevent them from receiving, upon proper compensation, the benefits of a temporary home in said premises,and for which they can pay such charges as the said party of the second part shall from time to time determine. All of which gifts, contributions of moneys, and compensations, when paid, shall be credited to the maintenance fund and be used towards the general maintenance and support of the home that said party of the second part will establish on said premises.

"Third. The said trustees, successors or assigns, or the corporation which shall succeed them in the premises as hereinbefore provided, or the party of the second part, shall be and hereby are authorized to enact, from time to time, such rules and regulations to properly carry into effect the objects of this conveyance as they or it shall deem proper and advisable. It

being my desire and intention, and these premises are conveyed by me, giving and granting to said party of the second part, their successors and assigns, and the parties herein named, the fullest and broadest authority to establish upon said premises an opportunity to dispense Masonic charity without restriction except subject to the conditions herein contained."

These conditions were followed by a clause providing for a reversion of the title to the grantor or his heirs in case it should cease to be used for the trust purposes.

It appears that this deed was prepared by Mr. Thomas J. Pereles (now deceased) and that apparently no other trustee took any part in its preparation. *Mr. Van Brunt* gave the scrivener no special instructions. When the deed was presented to him for signature he gave it no careful consideration, but supposed it carried out his intentions to establish a home for all unfortunate Master Masons and their families, signed it, and gave it back to Mr. Pereles. Mr. Pereles at once recorded it, and it was never presented to the Consistory or to any official thereof in his official capacity. No attention was thereafter given to the deed by any one.

It will be seen by examination of the conditions of the deed that certain special privileges are reserved to Consistory members under the second condition which are not shared by Master Masons in general, also that all gifts and contributions must be used for the support of the home and cannot apparently be used for endowment or permanent improvements. It was proven and the court found that the insertion of these provisions in the deed and some minor provisions not deemed necessary to insert at length here was the unauthorized act of Mr. Pereles and that neither *Mr. Van Brunt* nor the majority of the trustees understood that any such provisions were contemplated or contained in the deed. The purpose of the grantor was simply to lay the foundation for a Masonic home for all needy Master Masons and their families without distinction, and this was the understanding of the Consistory and

its officers. A corporation called the "Wisconsin Consistory Home Association" (one of the defendants) was immediately formed by some of the members of the Consistory, and in April, 1906, the trustees of the Consistory deeded the property to the corporation subject to the conditions and trusts created by the deed made to them, and *Mr. Van Brunt* joined in and ratified the conveyance. This corporation immediately assumed administration of the trust, opened a home on the farm, and has continued to administer the same, there being now ten persons (all of whom are parties defendant in this action) receiving the benefits of the charity at this home. This corporation adopted rules for the government of the home and the admission of beneficiaries, but these rules extended the benefits of the home to Master Masons and their families generally and gave no special privileges to members of the Consistory. The members of the Consistory generally did not understand that they were entitled to any special rights in the charity over and above the rights of Master Masons generally.

Early in 1913 *Mr. Van Brunt,* desiring the home to do a larger work, made a written offer to contribute about $200,000 for the endowment of the charity provided the Grand Lodge of Master Masons of Wisconsin would take it over and thereafter support it. The Grand Lodge indicated its willingness to accept the charge, but on examination of the deed of trust it was discovered, apparently for the first time, that it contained the provisions already noted granting special rights to Consistory members and practically prohibiting the accumulation of an endowment fund as well as other lesser clauses, which were not consistent with the intention or understanding of *Mr. Van Brunt* nor with the understanding of the officers and members of the Consistory.

Thereupon this action was brought to reform the deed in the respects in which it did not agree with the understanding of the parties. In this action there were joined as defendants the corporation aforesaid, the trustees of the Consistory, six individual members of the Consistory, representing them-

selves and all other members of that body (now numbering over 2,700), as well as all the present occupants of the home and beneficiaries of the charity.

The defendants appeared and answered, and after hearing the testimony the court made findings substantially in accordance with the facts as hereinbefore stated and decreed reformation of the deed on the ground of mutual mistake as to its provisions.

The material changes thus made were in brief (1) the elimination from paragraph numbered "second" in the deed of that sentence giving members of the Consistory a right to build homes on the premises or to be received into the home regardless of their need for charity; (2) the addition to said "second" paragraph of words allowing gifts and contributions to be used to establish an endowment or for improvements; (3) the omission from the paragraph numbered "third" in the deed of the final words, viz. "an opportunity to dispense Masonic charity without restriction except subject to the conditions herein named," and the insertion instead of the words "a Masonic home for the benefit of indigent Masons of Wisconsin or the wives, minor children, widows, or orphans of Wisconsin Masons;" (4) the addition to said paragraph "third" of a clause allowing transfer of the title to such other Masonic body as should be deemed best able to manage the trust and insure its adequate support and perpetuity. The remaining changes were merely slight verbal changes in expression not affecting the essential meaning of the deed but tending to give greater clearness to the provisions.

For the appellants there was a brief signed by *Nohl & Nohl,* and oral argument by *Leo F. Nohl.*

For the respondent there was a brief by *George E. Morton* and *Charles B. Perry,* attorneys, and *Willet M. Spooner,* of counsel, and oral argument by *Mr. Morton.*

WINSLOW, C. J. The jurisdiction of a court of equity, when seasonably invoked, to reform written instruments

which by mutual mistake do not express the real meaning of the parties, is very ancient and well recognized. A deed establishing a charitable trust may doubtless be thus reformed in a proper case providing the necessary parties are before the court. The necessary parties are all present in this action, namely, the original grantees in the deed, the corporation at present holding the title, the present trustees of the Consistory, a sufficient representation of the 2,700 members of the Consistory to satisfy that provision of the Code allowing one or more to defend for the benefit of all (sec. 2604, Stats. 1915), and all of the present beneficiaries of the charity.

It is probably very rarely the case that a court would be justified in decreeing reformation of a deed after the lapse of eight years. In most cases probably so long a delay would be rightly regarded as inexcusable laches or rights of third persons would have intervened which would make any change in the title inequitable. Where, however, no rights have been acquired by third persons and the lapse of time is satisfactorily explained, there is no logical reason why mutual mistakes of this nature should not be corrected even after years have passed by.

In the present case the lapse of time is very satisfactorily accounted for. The deed, after its execution and recording, was never submitted to the officers of the Consistory and at once went into the personal possession of the scrivener, Mr. Pereles, and there remained; neither the grantor nor any members of the Consistory thereafter examined it or the record; and there does not seem to have been any event naturally calling for or suggesting such an examination until the proposition of *Mr. Van Brunt* to endow the institution in 1913. At this time the matter was looked up and then it was learned that provisions appeared in the deed greatly hampering the scheme of the charity. Had these been conditions knowingly imposed by the parties when the trust was created, there would of course be no room for reformation of the deed.

Courts will not make agreements for parties. But the proof is very satisfactory that both *Mr. Van Brunt* and the officers of the Consistory generally understood that the intention was to create a home for indigent Master Masons and their families on a broad scale and not to grant special privileges to any particular class or body. It was natural that they should allow Mr. Pereles, who was a Mason, a lawyer, and a business man of experience, to draw the conveyance, and it was equally natural that both grantor and grantees should not scrutinize it closely but accept it without careful examination. The proof is ample that this was the case. All had confidence in him, and it is a well known fact that laymen frequently sign documents which trusted legal friends have drawn without full examination and with the idea that legal phraseology is difficult of understanding in any event and is hardly worth the effort. It will probably always remain a mystery how Mr. Pereles came to draw the deed as he did. But whether it was the result of innocent misapprehension of *Mr. Van Brunt's* intentions or was a deliberate misstatement of those intentions it is abundantly proven that the deed did not contain the provisions necessary to carry out the offer of *Mr. Van Brunt* or the understanding of the Consistory. The changes in the deed made by the judgment seem to be simply the changes necessary to make the deed speak in complete terms the understanding of the parties at the time, and, as the delay is sufficiently explained and no rights of third persons have intervened, the judgment must be affirmed.

By the Court.—Judgment affirmed without costs.

VAILLANT and wife, Appellants, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent.

May 23—June 13, 1916.

Railroads: Fences: Death "occasioned" by want of fence.

1. Where a boy sixteen years old, having entered upon a railroad right of way at a place where it should have been but was not fenced, boarded a moving freight train and after traveling several miles was killed in attempting to jump from the train while it was in motion, his death was not, within the meaning of sec. 1810, Stats. 1915, "occasioned . . . in whole or in part" by the want of a fence, there being no causal relation between them.
2. The word "occasioned" in said sec. 1810 means caused incidentally or indirectly.

APPEAL from an order of the circuit court for Brown county: HENRY GRAASS, Circuit Judge. *Affirmed.*

The action was brought by the plaintiffs to recover damages for the death of their son, George Vaillant, whose death is alleged to have been "occasioned" by the absence of a fence on defendant's railroad right of way.

George Vaillant, son of the plaintiffs, was sixteen years of age at the time of his death. On October 31, 1914, he entered upon the defendant's right of way in the city of Green Bay at a point where Maple avenue, if extended northerly to Seventh street, would intersect defendant's right of way. There was no fence on the side of the railroad tracks at this place and this area did not constitute depot grounds. The boy boarded a moving freight train at this place and managed to get into one of the cars. When the train reached Pine street, De Pere, the boy attempted to get off from the train while it was in motion and was killed.

The plaintiffs allege that the absence of the fence "occasioned" the boy's death; that if the fence had been there he would have been interrupted in his course and delayed in reaching the moving train and that he could not have caught

the moving car. The complaint contains no allegation showing that the decedent entered onto the railroad in the ordinary course of travel and over a well established path commonly used by the public with the acquiescence of the railroad company.

The defendant demurred to the complaint as not stating facts sufficient to constitute a cause of action. The court made an order sustaining the demurrer. From such order this appeal is taken.

For the appellants there was a brief signed by *Kaftan & Reynolds* (by *Robert A. Kaftan*), and oral argument by *Robert A. Kaftan.*

Edward M. Smart, for the respondent.

SIEBECKER, J. The argument is made that the boy's death was "occasioned, . . . in whole or in part, by the want of such fence." Sec. 1810, Stats. 1915. The meaning of the word "occasioned" as used in this statute has been adverted to in the opinions of this court and is declared to signify that which is caused incidentally or indirectly. *Curry v. C. & N. W. R. Co.* 43 Wis. 665; *Schwind v. C., M. & St. P. R. Co.* 140 Wis. 1, 121 N. W. 639. In this sense of the statute can it be reasonably asserted that the omission of the fence under the alleged facts was the means of producing the boy's death? Did it incidentally cause his death, or are we compelled to say that his death is attributable to other elements of the transaction? The claim that the presence of a legal fence on the right of way would have intercepted the boy in the progress of his course and have prevented him from catching the moving train and thus he would have avoided the injury, is based on inferences highly speculative, uncertain, and purely conjectural. It cannot be said, in the light of common experience, that such a fence would have intercepted or diverted the boy in his undertaking to reach the moving train. We know that such a fence is hardly an im-

pediment in the course of a normal boy sixteen years of age in attempting to catch a moving train. It is a mere surmise to assert that its presence would have diverted him from pursuing his perilous expedition, or that it would have prevented him from catching the moving train. The conditions and events of the whole affair afford no reasonably certain basis for an inference that the absence of the required railroad fence was an incidental cause or means of producing the boy's death.

It is furthermore to be observed that the injury causing the boy's death was inflicted at De Pere, about five miles distant from the place where he got on the train, when he attempted to jump off from the moving car. It is obvious that he had successfully carried out the first steps of his undertaking. As the trial court declared: "He sought to steal a ride on a freight train to the neighboring city, several miles away. He accomplished his purpose, and was not injured because of the fact that he tried to board the train, . . . but because of the fact that later he sought to jump off from the moving train several miles further on." His reckless conduct in jumping off from the moving car was the real peril that "occasioned" his injury. This act is disconnected and separated from the absence of the fence and in the natural course of things constitutes an independent event as related to the resulting injury. The evident answer to the inquiry, What occasioned the boy's death? is that it was the natural consequence of his voluntary act of jumping off from the moving train. This act was wholly unrelated to the company's omission to have a railroad fence. The two events had no causal relation, and the latter cannot be considered as causing the death in any incidental or indirect manner. Without pursuing the inquiry further, in the light of the facts alleged in the complaint it cannot be held that the boy's death was "occasioned in any manner, in whole or in part, by the want of such fence." Plaintiff cites to our attention *Schwind v. C., M. & St. P. R. Co.* 140 Wis. 1, 121 N. W. 639; *Alexander*

v. M., St. P. & S. S. M. R. Co. 156 Wis. 477, 146 N. W. 510; *Ulicke v. C. & N. W. R. Co.* 152 Wis. 236, 139 N. W. 189; and *Bejma v. Chicago & M. E. R. Co.* 160 Wis. 527, 149 N. W. 588, 152 N. W. 180, and relies upon them as authorities to sustain the defendant's liability upon the complaint. An examination of them has convinced us that these cases are clearly distinguishable from the instant one and that the rules governing those cases do not apply here.

By the Court.—The order appealed from is affirmed.

REGINA COMPANY, Appellant, vs. TOYNBEE, Respondent.

May 24—June 13, 1916.

Interstate commerce: Conditional sale: Filing of contract: Resale before payment of price: Foreign corporations: Validity of contracts: Taking security for interstate commerce debt.

1. A piano brought into Wisconsin under a conditional bill of sale, the title being retained by a foreign corporation, remained an article of interstate commerce while unpaid for in the possession of the original buyer.
2. Where the conditional bill of sale was duly filed, a sale of the piano by the original buyer to a person having no actual knowledge of the conditional sale, and its removal to another place, did not alter the status of the piano as an article of interstate commerce or affect the rights of the foreign corporation, the original seller.
3. Where, in such case, the foreign corporation, still retaining title to the piano, took a note of the second buyer for the amount remaining unpaid, the transaction being in form a conditional sale reserving title in the corporation until the note was paid, this amounted merely to the taking of additional security and holding the piano as an article of interstate commerce until the debt was paid,—which the corporation might do without having complied with sec. 1770*b*, Stats.

SIEBECKER and VINJE, JJ., dissent.

APPEAL from a judgment of the circuit court for Price county: G. N. RISJORD, Circuit Judge. *Reversed.*

This action was brought to recover on a promissory note. The defense was that plaintiff was a foreign corporation not licensed to do business in this state and that the transaction was not interstate commerce, hence there could be no recovery. The court so held and dismissed the action, from which this appeal was taken.

No bill of exceptions was settled. The case is here on the findings, which are as follows:

That the plaintiff is a New Jersey corporation, not licensed to do business in this state, not having complied with sec. 1770*b* of the Wisconsin Statutes; that on or about July 17, 1912, plaintiff shipped an electric piano from Chicago, Illinois, to one Procknow, at Marshfield, Wisconsin, under conditional sale, reserving title in itself; that Procknow had and used, under his conditional purchase, the piano in his saloon at Marshfield until about November 1, 1912, when he, being still a resident of Marshfield, sold the piano to the defendant, *Toynbee,* at Park Falls, Wisconsin, his contract of sale with plaintiff being on file with the city clerk at Marshfield; that at the time of said sale by Procknow there was a balance due plaintiff from him upon the purchase price thereof; that the piano was delivered to defendant by Procknow pursuant to the attempted sale by Procknow at Park Falls, Wisconsin, and the defendant used the same in his saloon at that place until and after the note here sued upon was executed; that defendant purchased the piano from Procknow without actual knowledge of the conditional sale of the piano to Procknow by plaintiff; that on or about January 23, 1913, Procknow being in default on payments, an agent of the plaintiff traced the piano to the possession of defendant at Park Falls, Wisconsin, and informed the defendant of the nature of Procknow's purchase from plaintiff and of Procknow's delinquency in payments to the extent of $180.25 and made demand on the defendant for the possession of the piano or the balance due upon the purchase price, whereupon the defend-

ant agreed to pay $180.25, that being the amount due from Procknow to plaintiff, and plaintiff agreed to relinquish to the defendant its title to the piano, and in accordance therewith the note here sued upon for the sum of $180.25 was executed and made payable at Park Falls, and delivered to the plaintiff's agent there, the transaction being in form a conditional sale under a written instrument signed by the defendant, wherein title to the instrument was still reserved in the plaintiff until the note was paid; that it was also provided in said instrument that it should not take effect and be valid until accepted by plaintiff; that said contract was forwarded to the office of plaintiff in New Jersey and by it accepted; that no part of said note has been paid, the piano remaining in the possession of the defendant; that said Procknow did not consent to the conditional sale by plaintiff of its interest in the piano to defendant nor did plaintiff release Procknow from liability under his said contract with it.

The court concluded that the transaction transferring by plaintiff to defendant its interest in the piano and the taking of the note in question did not constitute an act of interstate commerce, but was an effort by plaintiff to sell an interest in its property, which had at the time of the sale become part of the mass of property in the state, and was therefore void; that defendant is entitled to judgment dismissing plaintiff's complaint.

The cause was submitted for the appellant on the brief of *Barry & Barry,* and for the respondent on that of *Holland & Lovett.*

KERWIN, J. Counsel for appellant insists that, upon the findings made and the undisputed facts, plaintiff is entitled to reversal on the ground that the transaction between plaintiff and defendant in taking security for the debt in question amounted to interstate commerce.

The piano in question was brought into Wisconsin under a

conditional bill of sale, the title remaining in the foreign corporation, and was an article of interstate commerce all the time that it remained unpaid for in the hands of the original purchaser, Procknow. *F. A. Patrick & Co. v. Deschamp,* 145 Wis. 224, 129 N. W. 1096; *S. F. Bowser & Co. v. Schwartz,* 152 Wis. 408, 140 N. W. 51; *St. Louis C. P. Co. v. Christopher,* 152 Wis. 603, 140 N. W. 351.

The conditional bill of sale was filed with the city clerk at Marshfield, which was Procknow's place of business and residence and the proper place of filing under sec. 2317, Stats. The transfer of the piano by Procknow to the defendant and its removal to Park Falls did not prejudice the plaintiff's rights. *Bailey v. Costello,* 94 Wis. 87, 68 N. W. 663. The appellant had a right to follow its property to Park Falls and collect the balance due thereon under the conditional sale. The transaction which occurred between plaintiff and defendant merely involved the collection of the plaintiff's claim upon the property secured to it by the conditional sale. The transaction by which plaintiff assented to the transfer and the taking of additional security by way of conditional agreement, whereby the title was still to remain in plaintiff, amounted to a taking of security and holding the property as an article of interstate commerce until the debt was paid. *F. A. Patrick & Co. v. Deschamp, supra.* As said in the *Patrick & Co. Case:* "So long as it appears that the security is taken for the *bona fide* purpose of securing and collecting an interstate commerce debt and is being enforced by ordinary and lawful methods for that purpose alone, the statute referred to can have no application."

In the case at bar the title to the instrument never passed to any one in this state, and the piano always retained its status as an article of interstate commerce. Under such circumstances a foreign corporation, without compliance with the statute, may take security in this state for debts due by residents of this state. *Charter Oak L. Ins. Co. v. Sawyer,* 44

Wis. 387; *Chicago T. & T. Co. v. Bashford,* 120 Wis. 281, 97 N. W. 940.

Counsel for respondent relies strongly upon *Duluth M. Co. v. Clancy,* 139 Wis. 189, 120 N. W. 854, and *Sprout, Waldron & Co. v. Amery M. Co.* 162 Wis. 279, 156 N. W. 158. We think these cases are clearly distinguishable from the instant case. In the *Duluth M. Co. Case* the goods were shipped by a resident of another state to his commission agent in Wisconsin, not in response to an order from the factory, but to be held as part of his stock of commission goods in Wisconsin, and it was held that the sale and delivery thereof by the commission agent was not a transaction of interstate commerce. A careful examination of the *Sprout, Waldron & Co. Case* will also show that it is not controlling in the instant case.

By the Court.—The judgment of the court below is reversed, and the cause remanded for further proceedings according to law.

SIEBECKER, J. (*dissenting*). When defendant gave plaintiff his note for $180.25 on January 23, 1913, the piano had been in Wisconsin in the possession of Procknow since July, 1912. Procknow received it from plaintiff at that time under a conditional sale contract whereby plaintiff retained a right to the title in the piano to secure the balance of the purchase price, which was payable in instalments evidenced by notes. In November, 1912, defendant bought and received possession of the piano from Procknow. There can be no dispute but that the piano at this time was in fact in Wisconsin and had become mingled with the mass of property of this state. Under these circumstances it had been completely removed from the channel of interstate commerce when defendant dealt with plaintiff in January, 1913. *Greek-American S. Co. v. Richardson D. Co.* 124 Wis. 469, 102 N. W. 888. True, plaintiff still had an interest in the

piano to secure his interstate commerce debt and the right to enforce such debt. *F. A. Patrick & Co. v. Deschamp,* 145 Wis. 224, 129 N. W. 1096. But plaintiff did not do this. The facts of the case show that plaintiff agreed with defendant in January, 1913, to sell defendant its interest in the piano by a conditional sale contract which secured payment of the note in suit of $180.25, the amount unpaid on the sale to Procknow. This sale and transfer by plaintiff of its interest in the piano to defendant, after the piano had become Wisconsin property and had passed out of the channels of interstate commerce, is not in nature and substance the taking of security to insure payment of the original interstate commerce debt of Procknow, but is in fact an independent new obligation of a third person who is not connected with the original interstate commerce transaction. It was in all its essential features a sale of Wisconsin property negotiated in Wisconsin to a Wisconsin citizen. The obligation evidenced by this note is the separate individual obligation of defendant bottomed on the consideration defendant agreed to pay plaintiff for the sale of its interest in the piano in January, 1913. These circumstances and conditions of the transaction make the sale an intrastate contract, which cannot be enforced by the plaintiff for want of compliance by it with sec. 1770*b*, Stats. 1915, and the judgment of the circuit court should be affirmed.

VINJE, J. I concur in the foregoing opinion of Mr. Justice SIEBECKER.

GERTZ and another, Respondents, vs. TOWN OF VAUGHN and another, Appellants.

May 24—June 13, 1916.

Towns: Powers: When town board may exercise powers of village board: Conflict of statutes: Highways: Paving village street: Special assessments: Estoppel.

1. Within the meaning of sub. (13), sec. 776, Stats., the exercise by a town of the powers conferred by secs. 905 and 906 upon village boards in the matter of the improvement of streets "would conflict with the statutes relating to towns and town boards," in that the town board, exercising such powers, might cause one half of the cost of paving a street in an unincorporated village to be paid out of the town treasury and thereby exhaust the power of the town to raise money for highway purposes, and so deprive the electors of the town of the power to raise money for the repair and building of roads and bridges. The right to exercise such powers of village boards cannot, therefore, be conferred upon a town board by resolution of the electors of the town under said sub. (13), sec. 776.
2. The plan of the laws governing the construction and repair of highways in villages being fundamentally inconsistent with the laws relating to the building and repair of highways in towns, it is immaterial that they do not oppose each other at every point or that the town board might exercise a part of the powers enumerated in secs. 905 and 906 in such a way that there would be no conflict in a particular instance.
3. Where a town board had no authority or jurisdiction to pave a street or to levy a special assessment therefor on abutting property, an owner of such property who acquiesced in the doing of the work is not estopped to question the validity of the assessment.

APPEAL from a judgment of the circuit court for Iron county: G. N. RISJORD, Circuit Judge. *Affirmed.*

Action to enjoin the collection of a special assessment.

Plaintiffs allege that they are the owners of certain real estate abutting on Silver street in the unincorporated village of Hurley in the town of *Vaughn,* which town contained at the times mentioned a population of more than 500 inhabi-

tants; that the assessed valuation of the property of said town, real and personal, as equalized, was in 1913 $995,865; that there was in the town treasury in the highway fund on the 7th day of April, 1914, an unexpended balance of $247.65; that at the annual town meeting in 1914 no money for highway purposes was voted or raised, and that no tax for highway purposes was levied or assessed upon the real and personal property in said town for 1914, except a tax of three mills on the dollar of valuation thereof for highway purposes; that Iron county, in which the town of *Vaughn* is situated, did not contain within its borders a city having a population of 300,000 or more; that on the 7th day of May, 1914, the town board adopted the following resolution:

"Be it resolved by the town board of the town of *Vaughn*, Iron county, Wisconsin, exercising the powers of village boards under the provisions of chapter 40, Wisconsin Statutes, 1913, that we cause Silver street in the unincorporated village of Hurley in said town, to be graded and paved for a distance approximately five city blocks, to wit, extending east from the west side of Fifth avenue, in said village, along said Silver street to the Montreal river, said grading and paving to be done during the spring and summer season of 1914, work thereon to commence as soon as practicable."

That Silver street is one of the main traveled highways in the defendant town and that the distance stated in said resolution amounts to five city blocks, or approximately 1,950 feet; that thereafter the town board caused plans and specifications to be made, let a contract for the doing of the work, the contract price being in excess of $32,000, the work being completed about the 1st day of November, 1914; that after the letting of the contract and on the 19th day of August, 1914, the board of supervisors made and levied a so-called assessment for street improvement of said Silver street in said unincorporated village, assessing one half of the cost thereof to the abutting property owners and ordered the other half of the cost of the improvements to be paid out of the town

treasury; that the amount assessed was $131.75 for each twenty-five feet of frontage and the amount assessed against the plaintiffs was $263.50; that upon completion of the work settlement was had with the contractor and there was found to be due $33,540.35; that plaintiffs refused to pay the tax levied against their property; that the amount was included in the tax roll and that a warrant therefor was in the hands of the defendant *Edward M. Reible* as treasurer of the town of *Vaughn,* who was threatening to levy upon the property of the plaintiffs to satisfy the same. Plaintiffs further alleged that the tax was void and assigned six reasons therefor, which may be summed up as follows: That the town board had no authority in law to pave the highway or street and levy a special assessment therefor and that the plaintiffs had no notice of the alleged assessment. Plaintiffs asked that the town of *Vaughn* be perpetually restrained and enjoined from enforcing the collection of the special tax and that the defendant *Reible* and his successors in office be perpetually enjoined from attempting to collect said tax or from returning the same delinquent to the county treasurer of Iron county.

The defendants answered, admitting in the main the allegations of fact in plaintiffs' complaint as hereinbefore stated, alleged that the town of *Vaughn* contained a population of more than 1,500 and had within its limits the unincorporated village of Hurley, containing more than 1,500 inhabitants; that at the town meeting held in April, 1914, a resolution was adopted conferring upon said town all the powers relating to villages and conferred upon village boards by the provisions of ch. 40 of the Statutes, excepting those the exercise of which would conflict with the statutes relating to towns and town boards, which resolution, it appears from a stipulation, is as follows:

"Resolved, by the electors of said town of *Vaughn,* duly assembled at the annual town meeting held in said town this 7th day of April, 1914, that all powers relating to villages

and village boards conferred by the provisions of chapter 40 of the Statutes and the acts amendatory thereof, except those the exercise of which would conflict with the statutes relating to towns and town boards, be, and all such powers are hereby conferred upon said town of *Vaughn,* and the town board thereof."

The answer further alleged that a like resolution had been adopted at every annual town meeting held in said town for more than fifteen years immediately preceding; that the powers exercised by the town board of said town in regard to the paving of Silver street were conferred upon said town and exercised by said board pursuant to and by virtue of the aforesaid resolution, and that the board was authorized to exercise the same. The answer further alleged that the paving of Silver street had long been considered and discussed by the taxpayers of the town; that the plans therefor were on file and were a matter of public record; that bids for the doing of the work were advertised for and submitted to the board; that the making of the contract was a matter of editorial comment in the newspapers published in the village of Hurley; that the town clerk's minutes covering the entire matter were published in the official paper of the village and also in the Iron County News; that the names of the contractor and other bidders were given, and that the plaintiffs had full knowledge of all of the facts connected with the paving of Silver street; that a notice of the special assessment was published for two weeks in the Montreal River Miner; that the contractor has been paid $19,700 and no more; that no part of the special assessment has been paid except the sum of $7,143.50; that after the making of the special assessment plaintiffs made no objection thereto, but by statements, conduct, acquiescence, and silence led the defendants to believe that they would pay the assessment, and that the plaintiffs are now estopped from questioning the validity of such special assessment.

The case was tried mainly upon affidavits and upon stipulations of the parties. The court made findings of fact,

which, in our view of the case, it is not necessary to set out in full. The findings establish the allegations of the complaint, the adoption of the resolution by the town meeting as alleged in the answer, the making of the assessment, the attempt to collect the same, and upon the question of estoppel and the contention of the parties the court found as follows:

"That before any work was done in front of plaintiffs' said premises under said contract, demand was made of them by said town that they pay the tax so levied upon their said property, namely, $263.50, to which demand the only reply made by plaintiffs was that they did not then have the money; a like demand was again made of plaintiffs by said town about the time the work was begun in front of their said lot under said contract, to which they made the same reply. Plaintiffs did not offer or raise any objection to making such payment in accordance with said demand, or in any way question the legality of said special assessment, until long after the completion of said improvement, nor did they at any time object to the making of such improvement in front of their said premises or in any part of said street. Plaintiffs knew of the progress of said work from day to day from the inception to the completion thereof.

"And the attorneys for the plaintiffs contending that said tax or assessment is void (1) because the exercise by a town of the power to grade and pave streets under secs. 905 and 906 of the Statutes conflicts with the statutes relating to towns and town boards and could not therefore have been conferred upon the defendant town by the electors thereof; (2) because said secs. 905 and 906 are unconstitutional; and (3) because the contract price of said improvement exceeded the amount which the defendant town could legally levy for the highway purposes plus the amount of the highway money on hand; and the attorneys for the defendant town contending (1) that the exercise by a town of the power to grade and pave streets under secs. 905 and 906 of the Statutes does *not* conflict with the statutes relating to towns and town boards and that such power was therefore conferred upon the defendant town by the resolution adopted by the electors; (2) that said statutes are constitutional; and (3) that the fact that the contract price of said improvement exceeded the amount which said town could legally levy for highway purposes plus the amount of highway moneys on hand, has no

bearing on the validity of said special assessment; and said attorneys having accordingly stipulated that if the town had no power to levy said special assessment under said secs. 905 and 906 of the Statutes, or if the fact that the contract price of said improvement exceeded the amount which said town was authorized to levy for highway purposes plus the highway funds on hand deprived said town, or the board thereof, of jurisdiction to make said levy or assessment, and if plaintiffs are not estopped to raise the objection, then said special assessment or tax was and is void, and that judgment should in that event go for plaintiffs; otherwise that said special tax or assessment is valid and that judgment in that event go for the defendant."

As conclusions of law the court found that the exercise by a town of the power to grade and pave streets under secs. 905 and 906 of the Statutes conflicts with the statutes relating to towns and town boards, and that such power could not have been conferred on the defendant town; that the contract price of said improvements exceeded the amount which the defendant town could legally levy for highway purposes plus the amount of highway money on hand; that the plaintiffs are not estopped to attack said special tax or assessment; and that said special tax or assessment is void. Plaintiffs had judgment accordingly, from which defendants appeal.

A. L. Ruggles, attorney, and *Wm. F. Shea,* of counsel, for the appellants, contended, *inter alia,* that the voters having conferred village powers on the appellant town it had the same power as a village in respect of paving streets in the unincorporated village of Hurley and charging one half the cost thereof to the abutting property; and the exercise of such power did not conflict with any statute relating to the towns or town boards. Sub. (13), sec. 776, Stats. 1913; *Land. L. & L. Co. v. Brown,* 73 Wis. 294, 40 N. W. 482; *Hurley W. Co. v. Vaughn,* 115 Wis. 470, 91 N. W. 971; *Bennett v. Nebagamon,* 122 Wis. 295, 99 N. W. 1039.

For the respondents there was a brief signed by *Geo. C. Foster* and *Marion F. Reed,* attorneys, and *C. A. Lamoreux,*

of counsel, and oral argument by *Mr. Foster* and *Mr. Lamoreux.*

There was also a brief on the question of estoppel by *Van Dyke, Shaw, Muskat & Van Dyke,* attorneys for Marquette Cement Manufacturing Company, as *amici curiæ.*

ROSENBERRY, J. The fundamental question in this case may be stated thus: Did the adoption of the resolution by the electors at the annual town meeting of April, 1914, confer upon the town board of the town of *Vaughn* the authority to grade and pave streets in the unincorporated village of Hurley and levy a tax therefor under secs. 905 and 906, Stats.?

It is conceded that the resolution did confer such power if there is no "conflict" within the meaning of sub. (13), sec. 776, Stats., which is as follows:

"All powers relating to villages and conferred upon village boards by the provisions of chapter 40 of the Statutes, excepting those, the exercise of which would conflict with the statutes relating to towns and town boards, are conferred upon towns which contain a population of not less than five hundred and having therein one or more unincorporated villages, and may be exercised by the board of such town when directed by resolution of the electors thereof at an annual town meeting."

The laws relating to the repair and building of highways in towns may be briefly stated as follows: Sec. 776, Stats. 1915, authorizes the qualified electors of each town at the annual town meeting to vote to raise money for the repair and building of roads and bridges, or either, for the support of the poor and defraying of other charges and expenses of the town, provided that the total tax levied in any town for any one year for all town purposes, exclusive of school taxes and liabilities theretofore lawfully incurred, shall not exceed in the whole one per centum of the total assessed valuation of such town for the preceding year, unless a larger sum is needed for the building or repairing of highways or bridges,

in which case the electors may vote and the proper authorities may levy not to exceed one fourth of one per centum in addition to the aforesaid one per centum.

In addition to the amounts provided by the electors, the supervisors of each town (sec. 1240) may assess on the valuation of the real and personal property in each town an amount not less than one nor more than seven mills on the dollar; provided that in addition to such amount there may be assessed any additional amount which shall have been authorized by the last preceding annual town meeting, not exceeding in all ten mills on the dollar of such valuation; provided further that no town containing less than 500 inhabitants shall levy or collect in any year a highway tax of more than $2,000, including the amount voted by any town meeting and the amount levied by the supervisors; and that no town containing two Congressional townships or more and more than 500 inhabitants shall levy or collect a highway tax, exclusive of that first authorized by the section, of more than $3,000.

Under the statutes relating to villages a village board has power (sec. 893) to lay out, open, change, widen, or extend roads, streets, lanes, alleys, sewers, parks, squares, or other public grounds, and to grade, improve, repair, or discontinue the same or any part thereof, or build and repair any bridges thereon, etc., and to levy and provide for the collection of taxes and assessments; (sec. 905) when the county contains less than 150,000 inhabitants, to cause any street or any part of any street not less than sixteen rods in length to be graded, paved, macadamized, or otherwise improved, including the construction of curbs and gutters, and for the purpose of so improving any street the village board may levy and cause to be collected upon the lots, tracts, or parcels of ground fronting or abutting upon such street or part of the street improved, and upon the owners thereof, a tax sufficient to pay the expense of constructing such improvement as ordered

opposite such property to the center of the street, or such proportion thereof, not less than half, as they shall deem justly assessable to such property, if they shall think the whole ought not to be assessed, in which case the remainder shall be paid from the village treasury, and if the tax so levied shall prove insufficient to pay the cost or proportion thereof assessed against such property, the village board may levy an additional tax thereon to make good such deficiency.

The manner in which the tax shall be assessed and collected is prescribed by sec. 906.

Sec. 914 provides that the village board shall determine the amount of corporation tax to be levied and assessed on the taxable property in the village for each year, which shall not exceed in any one year two per centum of the assessed valuation of such property. Before any tax for any specified purpose exceeding one per centum of said valuation can be levied the matter must be submitted to the village electors.

Sec. 914*a* provides that the village board shall, at the time of determining the amount of the village taxes to be levied and raised in such village for the current year, determine the amount, if any, of highway tax to be levied and collected in such village for the current year, which shall not exceed in any one year one tenth of one per centum of the assessed valuation of such property.

Does the exercise of the powers relating to villages and conferred upon village boards in the matter of the improvement and repair of highways conflict with the powers relating to towns and town boards? We think it does, in a vital and substantial way. If a town board, exercising the powers conferred upon a village board by statute, may cause one half of the cost of paving to be paid out of the town treasury, they can, as in this case, by improving a village street, exhaust the power of the town to raise money for highway purposes, and so deprive the electors of the town of the power to raise money for the repair and building of roads and bridges.

This court, having under consideration the question of whether or not a town had power to raise money by general taxation to build sidewalks and light public streets in an unincorporated village within its boundaries, said:

"That the legislature did not purpose creating any such power as that contended for, is quite plainly indicated by the fact that it adopted a complete system in relation to the subject, by resorting solely to local taxation for the particular local purpose, in harmony with the general scheme of town government. Such system is found in secs. 1243, 1346*a*, 1346*b*, and 819, Stats. 1898. In so industriously providing for such local matters, it is the opinion of the court that it was intended to make the plan exclusive." *McGowan v. Paul,* 141 Wis. 388, 391, 123 N. W. 253.

The same may be said of the plan of the laws governing the construction and repair of highways in villages. In order that there be a conflict it is not necessary that the plans oppose each other at every point. It is sufficient if they are fundamentally inconsistent. It may be contended that there is no conflict if only that part of sec. 905 which authorizes the village board to assess the entire cost of improvements to abutting property owners be considered as adopted. The difficulty with that contention is that the statute does not provide for two things but for one thing. If the powers enumerated in secs. 905 and 906 are exercised they conflict with the powers conferred upon towns, and the powers enumerated in secs. 905 and 906 are therefore not conferred upon towns by the adoption of a resolution under sub. (13), sec. 776, Stats. It makes no difference that in a particular instance the town board might not fully exercise the powers enumerated in said sections. The question is not whether a town board can exercise a part of the powers enumerated in such a way that there would be no conflict in a particular instance. The question is, Do the powers, if exercised, conflict? If they do, then the power is not conferred either in whole or in part. If the statute conferred upon village boards the authority to cause improvements to be made of the character specified and

required the whole cost thereof to be assessed against abutting property owners, a different question would be presented. The town board could not under such a law, by improving village streets, exhaust the power of the town to raise money for highway purposes, and the exercise of one power would not then conflict with another. As the law stood in 1914 there was a clear conflict.

Therefore, upon the facts found, the town board in this case was without authority or jurisdiction in the premises, and the principle of estoppel does not apply, as has been held by successive decisions of this court. *McGowan v. Paul,* 141 Wis. 388, 123 N. W. 253; *Menasha W. W. Co. v. Winter,* 159 Wis. 437, 150 N. W. 526. The conclusion reached renders unnecessary the consideration of the remaining questions which were argued.

By the Court.—Judgment affirmed.

SLACK, Respondent, vs. JOYCE, Appellant.

May 24—June 13, 1916.

Negligence: Injuries: Collision between automobile and bicycle: Contributory negligence: Evidence: Habitual carefulness of chauffeur: Damages: Resulting illness: Excessive damages.

1. In an action for injuries sustained in a collision between plaintiff's bicycle and defendant's automobile, findings by the jury that defendant was negligent and plaintiff free from contributory negligence are *held* to be sustained by the evidence.
2. Evidence offered by defendant to show that her chauffeur was an unusually careful, painstaking driver with regard to persons or vehicles on the street was properly excluded as incompetent.
3. It appearing that four or five weeks after the accident plaintiff contracted typhoid fever, and that food, water, and air are the only media by which typhoid can be communicated, testimony of the attending physician that in his opinion there was a connection between plaintiff's sickness and the accident and that he considered this all the time, but not explaining what he meant by "connection" between them, was insufficient to warrant the

jury in finding that the disease was caused by or had any connection with the injury. To form a basis for damages in such a case, the connection must rest upon proof and cannot be left to surmise or conjecture.

4. It appearing that plaintiff's injuries, aside from the disease not shown to have been caused by the accident, consisted of slight cuts and bruises which healed very quickly and a pain in the side which had disappeared in three months, an award of $725 is *held* excessive and he is given an option to take judgment for $400 or a new trial.

APPEAL from a judgment of the circuit court for Ashland county: G. N. RISJORD, Circuit Judge. *Reversed.*

This action was brought to recover damages for personal injuries sustained by plaintiff while riding a bicycle, the injuries resulting from a collision between plaintiff's bicycle and defendant's automobile, alleged to have been due to defendant's negligence. The jury returned the following verdict:

"(1) At what point did the collision between the plaintiff's bicycle and the defendant's automobile occur? *A.* About twelve feet south of the telephone pole.

"(2) Was the driver of defendant's automobile in the exercise of ordinary care in driving and managing it at the time of the collision between the automobile and plaintiff's bicycle? *A.* No.

"(3) If your answer to the foregoing question is 'No,' then was such want of ordinary care the proximate cause of plaintiff's injury? *A.* Yes.

"(4) Was plaintiff guilty of any want of ordinary care which contributed proximately to his injury? *A.* No.

"(5) At what sum do you assess plaintiff's damages? *A.* $725."

Judgment was rendered on the verdict in favor of plaintiff, from which this appeal was taken.

William F. Shea, for the appellant.

For the respondent there was a brief by *John Garvin,* attorney, and *Lamoreux & Cate,* of counsel, and oral argument by *C. A. Lamoreux.*

KERWIN, J. The appellant insists that the judgment should be reversed for the following reasons: (1) because the undisputed evidence acquits defendant of negligence; (2) because plaintiff was guilty of contributory negligence; (3) because the court erred in excluding evidence offered by defendant; (4) because the court misdirected the jury; (5) because the damages are excessive.

1. On the question of whether the evidence was sufficient to show negligence on the part of the defendant and contributory negligence on the part of the plaintiff we are of opinion that the verdict must stand. The accident occurred on the 18th day of September, 1914, in the city of Ashland, and the main dispute appears to be whether the automobile ran into the bicycle or the bicycle ran into the automobile. An examination of the record shows that there was a sharp conflict between the evidence on the part of the plaintiff and that on the part of the defendant. The jury found that the defendant was negligent and that the plaintiff was free from contributory negligence. The court below sustained these findings, and under the well established rule of this court we do not feel warranted in disturbing them.

2. Counsel for defendant assign error in the exclusion of evidence. Defendant offered to show that her chauffeur was an unusually careful, painstaking driver with regard to persons or vehicles in the street. This evidence was ruled out as incompetent and the ruling is complained of. We think there was no error in the ruling. *Koenig v. Sproesser,* 161 Wis. 8, 152 N. W. 473; Jones, Ev. §§ 148 (147), 163 (161).

3. It is further insisted that the judgment should be reversed on account of error in misdirecting the jury. It is claimed that the charge to the jury on the question of damages was erroneous in two respects: one with regard to the disease plaintiff contracted after being injured, and the second as regards his earnings. It appears from the evidence that some four or five weeks after the accident the plaintiff contracted ty-

phoid fever, and it further appears that food, water, and air are the only media by which typhoid can be communicated. The only evidence upon this subject is the testimony of Dr. Hosmer as follows: "Typhoid is usually caused by drinking polluted water. It might be caused by food—any food with a typhoid germ. In my opinion there was a connection between plaintiff's sickness and the accident. I don't know when I discovered it. I considered it all the time." Upon this evidence the court charged the jury that:

"There was some evidence received in the case of temperature and pain suffered by the plaintiff coming on some weeks after he left the hospital, and whether that illness was caused by the accident or not is a question for you to determine in assessing damages. You cannot assess damages for that illness unless you are reasonably certain from the evidence that such illness resulted directly from the injury he received."

This instruction referred to the typhoid fever contracted by plaintiff after leaving the hospital. The question under this instruction is whether there was sufficient evidence to warrant the jury in finding that the disease contracted several weeks after the injury was caused by such injury. We think the evidence insufficient to warrant the jury in finding that the disease was caused by or had any connection with the injury. It appears from the evidence that typhoid fever is neither the natural nor probable result of physical injury such as plaintiff sustained, and the only evidence in the case is that referred to of Dr. Hosmer to the effect that there was a connection between plaintiff's sickness and the accident; that he considered this all of the time; but he does not say that the injury caused the disease, and he does not explain what he means by connection between the illness and the injury. The connection between the disease and the injuries, in order to form a basis for damages, cannot be left to surmise or conjecture but must rest upon proof. *Kinziger v. C. & N. W. R. Co.* 156 Wis. 497, 146 N. W. 518; *Gray v. C. & N. W. R. Co.* 153 Wis. 637, 142 N. W. 505; *Wilber v. Fol-*

lansbee, 97 Wis. 577, 72 N. W. 741, 73 N. W. 559; *Hirte v. Eastern Wis. R. & L. Co.* 127 Wis. 230, 106 N. W. 1068; *Schmidt v. Pfeil,* 24 Wis. 452. Aside from the disease contracted some weeks after the accident the injuries were slight and consisted of some cuts and bruises which healed in a very short time, and under the evidence the pain in the side seemed to have disappeared in December, 1914.

In view of the fact that the evidence was not sufficient to warrant the jury in finding that the disease contracted by plaintiff was caused by the injury the damages are excessive. That portion of the charge referred to was erroneous. We have therefore concluded to give plaintiff the option to take judgment for $400 damages, and in case of his failure to so elect a new trial is ordered.

By the Court.—The judgment of the court below is reversed, and a new trial granted, unless the plaintiff, within twenty days from notice of filing of the *remittitur,* shall file his consent in writing with the clerk of the court to modify the judgment by inserting his damages at $400 in lieu of $725, in which event the judgment is so modified as of the date of entry. The appellant is entitled to costs in this court.

DROTT, Appellant, vs. STEVENS, Respondent.

May 24—June 13, 1916.

Vendor and purchaser: Quitclaim deed: Failure of title: Remedies.

1. The grantee in a quitclaim deed, in the absence of fraud, has no remedy either in law or equity against his grantor for failure of title.
2. So *held,* where the grantee, knowing that the grantor's title was based upon a tax deed and that he refused to give a warranty deed, and after obtaining the advice of an attorney, accepted a quitclaim deed in satisfaction of a debt of the grantor to him, both parties acting in good faith and in the belief that the grantor had good title.

APPEAL from an order of the circuit court for Price county: G. N. RISJORD, Circuit Judge. *Affirmed.*

Action to set aside a quitclaim deed executed in settlement of a debt of $1,409, and to recover judgment for the amount of said debt and interest. The following facts appeared from the complaint: In 1901 the A. H. Stange Company was the owner of a certain forty-acre tract of land in Price county. It paid the taxes thereon for that year, but by mistake the tax was returned delinquent and in due course of time the land was sold for taxes and a tax deed was issued to the G. F. Sanborn Company and duly recorded. In 1908 the G. F. Sanborn Company executed and delivered a quitclaim deed of said forty to the defendant herein, who was indebted to the plaintiff upon an account stated in the sum of $1,409. Defendant tendered a quitclaim deed of the land to plaintiff in satisfaction of his debt to him. Plaintiff said he would accept a conveyance of the land if defendant was the true owner thereof. The defendant stated that he believed himself to be the sole and true owner and offered to submit an abstract of the land. Plaintiff suggested defendant take such abstract to R. J. Hagerty, Esq., an attorney in Park Falls, for examination, which was done. After examination the attorney advised the plaintiff and defendant that the latter appeared to have a good fee simple title to the land, unless there were minor heirs entitled to redeem. Plaintiff then said he would accept the land if defendant would give him a warranty deed. This the defendant refused to do, saying he would give only a quitclaim deed. Plaintiff then agreed to accept a quitclaim deed and instructed defendant to make the deed to plaintiff's wife, which was done, whereupon plaintiff executed and delivered a receipt in full for his indebtedness to him. Both parties believed defendant had good title to the land and both acted in good faith upon such belief. Plaintiff asked for a decree setting aside the settlement and for judgment for $1,409 and interest from October 6, 1908, when the settlement was made. The defendant demurred to the complaint,

and from an order sustaining the demurrer the plaintiff appealed.

For the appellant the cause was submitted on the brief of *Holland & Lovett.*

K. K. Kennan, for the respondent.

VINJE, J. It is the settled doctrine of most courts in this country that a grantee in a quitclaim deed, in the absence of fraud, has no remedy either in law or in equity against the grantor for failure of title. *Whittemore v. Farrington,* 76 N. Y. 452; *Reed v. Bartlett,* 19 Pick. (36 Mass.) 273; *Botsford v. Wilson,* 75 Ill. 132; *Prichard v. Pasquotank & N. R. S. Co.* (N. C.) 86 S. E. 171, L. R. A. 1916A, 961; *Sherwood v. Moelle,* 36 Fed. 478, 1 L. R. A. 797; *Johnson v. Williams,* 37 Kan. 179, 14 Pac. 537; and see particularly 39 Cyc. 2010, note 77, where a large number of authorities on the question are collected. Such doctrine is based upon the ground that the grantee in a quitclaim deed knows that he takes only such title as his grantor has to convey; that he assumes the risk of its being a good title; and that the consideration is based upon the value of the kind of conveyance made. In the present case no fraud was practiced upon the grantee. He knew his grantor's title was based upon a tax title and that defendant refused to warrant the title. He had the advice of counsel that the title was good. The means of information as to the invalidity of the title were equally open and available to both parties. Under such circumstances plaintiff assumed the hazard as to title. His grantor conveyed all he agreed to convey and plaintiff received the consideration bargained for, namely, a quitclaim deed. There being no fraud and no mistake as to the kind of conveyance that was to be given and the contract being fully executed, plaintiff is without a remedy either in law or equity, and the demurrer was properly sustained.

By the Court.—Order affirmed.

GURNETT, Respondent, vs. J. H. FLICK CONSTRUCTION COMPANY, Appellant.

May 25—June 13, 1916.

Account stated: Delay in objecting: Presumption.

Tentative statements, with prices, of supplies furnished by a principal contractor to a subcontractor were rendered monthly for about six months and were O. K.'d and retained by the subcontractor; but upon completion of the work, when a final statement of account was made, he objected, without material delay, to the prices charged. It appeared that the statement for each month did not reach the subcontractor until about the end of the following month, that investigation would be required to ascertain the correctness of some items therein, and that many of the items objected to appeared only in the last statements rendered. *Held*, that under the circumstances the delay in objecting to items in the monthly statements merely raised a presumption of their correctness, but did not give such statements the force of an account stated.

APPEAL from a judgment of the circuit court for Lincoln county: A. H. REID, Circuit Judge. *Affirmed.*

Action on contract. This action was brought by the plaintiff to recover a balance due for work and labor performed in grading and grubbing certain parts of a railroad right of way for the defendant, who was a principal contractor, and for board for defendant's employees and teams and for labor and merchandise furnished at the defendant's request. The trial resulted in a verdict of the jury in favor of the plaintiff and judgment in his favor. Defendant appeals.

For the appellant there was a brief by *Curtis, Van Doren & Cole,* and oral argument by *Llewellyn Cole* and *George Curtis, Jr.*

For the respondent there was a brief by *J. & M. Van Hecke,* and oral argument by *John Van Hecke.*

ROSENBERRY, J. The assignments of error in this case involve only questions of fact, with one exception. We have carefully examined the evidence, which we think fully supports the verdict of the jury. The plaintiff was engaged in carrying on work for the defendant under a contract. Part of the understanding between the plaintiff and the defendant was that the defendant should purchase for the plaintiff certain camp supplies. Defendant purchased the supplies, and as they were delivered at plaintiff's camp from time to time they were accompanied by statements of account which were O. K.'d by plaintiff. The statements as rendered monthly disclosed the prices charged for the supplies. The first statement was rendered for February, and subsequently statements were rendered monthly down to and including the month of August. Plaintiff retained these statements and upon the completion of the work a final and complete statement of account was made. A part of the issues settled by the verdict of the jury was the price to be charged for the supplies so furnished. When the final statement of account was made plaintiff objected to the price charged him for the goods. The jury found that the defendant was entitled to charge a less amount than the prices shown by the O. K.'d statements. The defendant claims that the O. K. of the plaintiff and his failure to make objection until the final statement was rendered amounted to a binding agreement upon his part, and that the statements of account rendered each month thereby became an account stated and that the plaintiff was precluded from denying liability thereunder. The defendant cited 1 Cyc. 384; 1 Corp. Jur. 691, 694; *Voss v. Northwestern Nat. L. Ins. Co.* 137 Wis. 492, 503, 118 N. W. 212; *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, 89 N. W. 538, 92 N. W. 246; and *Ripley v. Sage L. & I. Co.* 138 Wis. 304, 119 N. W. 108.

We have given this matter careful consideration, and in disposing of it cannot do better than to approve and adopt

the language of the trial court found in his opinion deciding the motion for a new trial:

"I think the evidence does not warrant the conclusion that these accounts have become stated within the technical meaning of the term 'account stated.' It appears only that from month to month while work was going on tentative monthly statements were rendered to the plaintiff.

"The contract is dated January 30, 1914, and by its terms the work was to be finished by June 15th. The statement as to each month did not reach the plaintiff until substantially the end of the following month, so that the first statement rendered by defendant reached the plaintiff in the latter part of March. The work was all finished not later than August 2d. Many of the items involved in dispute in this action appear only in the last statements rendered to the plaintiff. Some of the items charged to the plaintiff would require some investigation to ascertain their correctness. The plaintiff appears not to have known, although he had some suspicion, that defendant was obtaining discounts on merchandise which were not credited to plaintiff. There appears to have been no material delay after rendition of the final account before plaintiff entered objections. Such delay as there was could not be given any further force or effect than to raise some presumption that the accounts as rendered were correct or unobjectionable. There was no such delay and acquiescence as would raise a conclusive presumption of correctness. The rule applicable to the facts in this case is that mere delay for a limited period without returning or objecting to accounts rendered merely raises a presumption or inference of acquiescence. Such presumption or inference is more or less strong according to circumstances. The neglect to return or object may be for such a length of time as to render such presumption conclusive of acquiescence so as to make an account stated. But the facts in this case could at most constitute only *prima facie* evidence of correctness. *Rose v. Bradley,* 91 Wis. 619, 65 N. W. 509; *Jones v. De Muth,* 137 Wis. 120, 118 N. W. 542."

The judgment is therefore correct.

By the Court.—Judgment affirmed.

STATE EX REL. ERVIN, Respondent, vs. COUNTY BOARD OF SUPERVISORS OF VILAS COUNTY and another, Appellants.

May 25—June 13, 1916.

Statutes: Construction: Legalizing acts of county board: Division of town: Apportionment of indebtedness: Constitutional law: Special legislation: Local law: Title: Sufficiency.

1. Ch. 17, Laws 1915, legalizing "all acts and proceedings" of the county board of Vilas county "relating to the detaching of certain territory" from one town and attaching parts thereof to other towns, "and in creating" two new towns from other parts thereof, validated all the proceedings of the board relating to such readjustment and rearrangement of the town government in the county, including the apportionment of the net indebtedness of the town from which the territory was detached.
2. Although, under sec. 672, Stats., the county board had no authority to apportion such indebtedness, the legislature, since it might have given such authority, could validate the unauthorized apportionment.
3. Such validating act is not a special law for "incorporating any . . . town," within the meaning of sub. 9, sec. 31, art. IV, Const.; nor is it a special law "for assessment or collection of taxes," within the meaning of sub. 6 of that section.
4. Under sec. 18, art. IV, Const., where a local law has one fundamental object and the various provisions of the law are mere details which relate or are germane to that object, it is sufficient to state that general object in the title.
5. Ch. 17, Laws 1915, embraced but one general subject, and its title—"An act to legalize the acts of the county board . . . in detaching certain territory from the town of . . . and attaching the same to the towns of . . . and in creating the towns of . . . in said county"—was sufficient without any specific reference therein to the apportionment of the indebtedness of the town from which the territory was detached.

APPEAL from a judgment of the circuit court for Vilas county: CHESTER A. FOWLER, Judge. *Reversed.*

Certiorari to set aside an ordinance passed by the *County Board of Supervisors of Vilas County* May 13, 1914, creating

the town of Lincoln in Vilas county and determining the proportion of the indebtedness of the town of Eagle River chargeable thereto. The petition challenges the validity of the ordinance because (1) the board did not consider the credits to which the new town was entitled by reason of buildings and other property retained by the town of Eagle River; (2) the county board had no power to determine the amount of indebtedness chargeable to the new town; (3) the board failed to fix a time for the town boards to meet to determine the question of the apportionment of indebtedness and credits between the new town and the town of Eagle River out of which it was carved.

It appears by the return that on May 13, 1914, seven ordinances were passed by the defendant board, numbered from 1 to 7 inclusive; that each of the ordinances numbered from 1 to 5 purported (1) to detach territory from the town of Eagle River and attach it to another existing town, and (2) to determine the total indebtedness of Eagle River in excess of its credits and what proportion thereof should be paid by the town to which the territory was added; that ordinances numbered 6 and 7 each purported to (1) detach territory from Eagle River and establish a new town (one called Lincoln and the other Washington), (2) fix a time and place for the first town meeting, and (3) determine the amount of the indebtedness of Eagle River in excess of its credits and the portion thereof to be paid by the new town. It further appeared that the ordinances were duly recorded and published and copies filed in the various offices required by the statute and that a validating act was passed by the Wisconsin legislature known as ch. 17, Laws 1915. This act is entitled "An act to legalize the acts of the county board of Vilas county in detaching certain territory from the town of Eagle River and attaching the same to the towns of Conover, State Line, Presque Isle, Plum Lake and Farmington and in creating the towns of Lincoln and Washington in said county

and in detaching certain territory from the town of Farmington and attaching the same to the town of Conover in said county."

The first section of said act reads as follows:

"Section 1. All acts and proceedings of the county board of supervisors of Vilas county had on the thirteenth day of May, A. D. 1914, *relating to the detaching* of certain territory from the town of Eagle River in said county and attaching parts thereof to the towns of Conover, State Line, Presque Isle, Plum Lake and Farmington and in creating the towns of Washington and Lincoln in said Vilas county; and all acts and proceedings of the county board of supervisors of Vilas county had on the third day of December, A. D. 1914, relating to the detaching of certain territory from the town of Farmington and attaching the same to the town of Conover in said county are hereby legalized."

The relator is a resident and taxpayer in the territory constituting the town of Lincoln and sued out this writ May 7, 1915.

The circuit court adjudged that those parts of the ordinance creating the town of Lincoln (being ordinance number 7) which purport to determine the amount of the indebtedness of the town of Eagle River in excess of its credits and to determine the amount of such excess chargeable to the town of Lincoln were illegal and void, and from this judgment the defendants appeal.

For the appellants there was a brief by *C. H. Weigand* and *Curtis, Van Doren & Cole,* and oral argument by *George Curtis, Jr.,* and *Llewellyn Cole.*

For the respondent there was a brief by *Niles A. Colman* and *Eberlein & Larson,* and oral argument by *Albert S. Larson.*

WINSLOW, C. J. By sub. (1), sec. 670, Stats. 1913, the county board of any county is authorized to set off, organize, vacate, and change the boundaries of the towns in the county.

It has been held by this court that this subdivision does not authorize the division of a town and the creation of a new town, but merely the change of boundaries of existing towns. *State ex rel. Rosander v. Lippels,* 133 Wis. 211, 113 N. W. 437.

By sec. 671 the county board is given power to divide a town provided that such division shall have been approved by vote of the electors at the next preceding annual town meeting pursuant to notice founded upon a petition of electors previously filed.

By sec. 672 it is provided that when a new town is formed from parts of an existing town or towns, or when territory is detached from one town and attached to another, the boards of the towns interested in the settlement shall meet in joint session and determine what portion of the indebtedness of the town from which the territory is taken shall be chargeable to and be paid by the new town or the town to which the territory is attached and what part of the credits shall be received by such last named town.

It is apparent from examination of these sections that ordinances numbered from 1 to 5 were valid so far as the detaching of territory from one town and attaching it to another was concerned, and that ordinances 6 and 7 were invalid so far as the creation of the two new towns was concerned, and that those parts of all the ordinances purporting to apportion the excess of indebtedness over credits were invalid.

This was the situation when the validating act set forth in the statement of facts was passed, and the serious question is whether this act validated those parts of the ordinances relating to the apportionment of the excess of indebtedness as well as those parts relating to the detachment and division of territory.

We are clearly of opinion that this question should be answered in the affirmative.

As already stated there was no necessity for validating

those portions of the first five ordinances which detached territory from one existing town and attached it to another, so, if the legislative intent was not to affect in any way the apportionments of the excess of indebtedness over credits, the legislature must be convicted of passing an entirely useless act so far as the first five ordinances were concerned. They needed no validation and every one must have known it.

Over and above this consideration, however, we can entertain no doubt from the comprehensive wording of the act and its title that the legislative intent was to cover the whole subject and validate all the proceedings of the board relating to this readjustment and rearrangement of the town government of Vilas county.

It is very evident that the whole scheme was viewed as one on the part of the county board and, quite as evident, we think, that it was viewed in the same way by the legislature.

"All acts and proceedings" . . . "relating to" the detaching of territory, "and in creating the towns of Washington and Lincoln," are legalized. In our judgment the words "relating to" qualify the creation of the new towns as well as the detaching of territory from old towns. The grammatical construction is not accurate or happy on account of the insertion of the word "in" before "creating," but no such circumstance as this should interfere with evident intent. "All the acts and proceedings relating to" the creation of the towns of Washington and Lincoln must certainly include the proceedings fixing and apportioning the excess of indebtedness between those towns and the existing towns from which they were taken.

It is familiar law that the legislature may validate an act which it might have authorized in the first instance. *Kimball v. Rosendale,* 42 Wis. 407. It is undoubted that the legislature could have given the county board authority to apportion the indebtedness and credits (such authority in fact existed for years and until the passage of ch. 62 of the Laws

of 1909), hence it could validate the present unauthorized act of the board.

But it is said that this is a special act incorporating a town and hence void under sub. 9 of sec. 31 of art. IV of the state constitution, which prohibits special legislation incorporating "any city, town or village." It is sufficient to say in answer to this objection that it has been held by this court that the carving of a county into new towns by act of the legislature was not "incorporating" such towns within the meaning of the constitution. *Cathcart v. Comstock,* 56 Wis. 590, 605, 14 N. W. 833. This rule has not since been departed from. *State ex rel. Graef v. Forest Co.* 74 Wis. 610, 43 N. W. 551. If the legislature could create a new town by direct act, it could do so by a validating act.

Again, it is said that the law is a special law for the assessment or collection of taxes and hence prohibited by sub. 6 of sec. 31 of art. IV of the constitution. We have been unable to see how the law can be considered as a law for the collection or assessment of taxes. It simply determines what part of the net indebtedness of the town of Eagle River the new town shall pay.

The law is unquestionably a "local" law within the meaning of the constitution and hence can embrace but one subject which must be expressed in the title. Sec. 18, art. IV, Const. This provision, however, is to receive a liberal construction so that the legislative purpose may be accomplished if possible. Where there is one fundamental general object and the various provisions of the law are mere details which relate or are germane to that object, it is enough to state that general object in the title. The details are necessarily and logically included therein. *In re Southern Wis. P. Co.* 140 Wis. 245, 122 N. W. 801. We regard the clauses which apportion the net indebtedness of the old town as details which, though not necessarily included in the creation of the new town, are germane thereto and so closely and naturally con-

nected therewith that they are sufficiently expressed in the title of the act before us.

By the Court.—Judgment reversed with costs, and action remanded with directions to the trial court to render judgment affirming the action of the county board.

ROSENBERRY, J., took no part.

SULLIVAN, Administrator, Appellant, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

May 25—June 13, 1916.

Master and servant: When servant engaged in interstate commerce: Injury: Negligence: Unsafe working place: Questions for jury: Assumption of risk: Contributory negligence.

1. One who performs work in putting prospective subjects of interstate commerce in a state of preparedness for transportation, is not engaged in interstate commerce within the meaning of the federal Employers' Liability Act.
2. In case of an employee being injured or killed while engaged in the line of his duty as such, and recovery of damages therefor being sought on the ground of want of ordinary care of the employer, or his officer, agent, or servant, the defense of assumption of the risk is not available to such employer.
3. Under sec. 2394—48, Stats., it is the duty of an employer to furnish his employee employment and a working place as free from danger as the nature of his labor will reasonably permit, and when whether such duty was performed is material and there is room in the evidence for a finding either way, the question is for the jury.
4. Where an employee is injured while engaged in the line of his duty, and there are more than four employees working in the common employment, contributory negligence of such employee is not available as a defense against the claim of such employee for damages.
5. Where a servant of a railroad company, who is not a shop or office employee, is injured and that occurs or is contributed to by violation by such company of any statute enacted for the safety

of employees, and an action is brought to recover damages for the injury, neither contributory negligence nor assumption of the risk is available to the company as a defense.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Juneau county: JAMES O'NEILL, Circuit Judge. *Reversed.*

Action to recover for the death of plaintiff's intestate who was killed February 15, 1915, while performing his duties as an employee of defendant. The event was directly caused by a pile of lumber tipping over upon, and crushing, the deceased. The claim of plaintiff was that defendant was negligent in so permitting the lumber to be piled that it was liable to tip over and injure employees who were required to work in the vicinity thereof; that the manner in which the lumber was piled rendered the working place of employees who were so required not up to the statutory standard of safety and that such negligence was the proximate cause of the accident, or contributed thereto, in greater degree than any default of deceased.

The claim of defendant was that the lumber was piled so as to be reasonably safe as regards tipping over and injuring any one; that deceased was engaged in interstate commerce at the time he was injured, and that he was perfectly familiar with the danger, if there were any reasonably to be apprehended of the lumber pile tipping over, and assumed the risk thereof.

The evidence established this: Defendant was a railroad corporation engaged in interstate and intrastate commerce. For several years deceased had been one of its gang foremen, working in its railroad yard at Tomah, Wisconsin, under the yard foreman and other superiors. As part of the yard equipment there was a lumber shed, planing mill, and shops used for fitting up repair and construction material for the road. A stock of lumber was customarily kept on hand in the lumber shed. As it came in on cars or otherwise, it was

piled in the shed in a manner directed by the superior of deceased. Sometimes, but not customarily, he took part in so placing lumber. The stock was drawn on from time to time as required to ship to points within and without the state. When so drawn on, it was taken to the planing mill or shops and fitted up as needed and then placed on cars for shipment. The lumber was piled in the shed in a number of panels on the north, and a number on the south, side of the eighty-feet long shed so as to leave a wide alley through the center and narrow alleys between the panels. The piles were built up in tiers without any crosspieces between the boards, thus leaving each outside tier entirely independent of the others. The piles varied in height from about eight feet down. There was one pile made up of several tiers eight feet high and six feet wide. East of it there was a pile of three tiers about eighteen inches high, and east of that a pile about four feet high, leaving between the two high piles a space about forty inches. The most easterly tier of boards was lower than other parts of the low pile between the two high piles. On the day of the accident, there was a requisition for a bill of lumber of specified kinds to be gotten from the shed, fitted up as required by work thereon in the planing mill and then shipped to Western avenue, Chicago, and added to the stock of material there for use as needed. The deceased, under direction of the assistant foreman, took the requisition and, with his crew, went to the lumber shed to select the required pieces. His superior accompanied him. After working some time, he, with the assistant foreman, came to the place where the accident occurred. He stepped on the most easterly tier of boards, which was lower than the pile between the two high piles, and stood there checking over the requisition with reference to further requirements. While so doing the assistant foreman took several boards from the tiers between the two high piles and pushed them to assistants outside of the shed to be taken to the mill. He then laid hold of a

board, which proved to be fast at one end, or in some way, in the high or a near-by pile, at the side of deceased. The latter took hold of the board and lifted on it, when the pile west of him tipped over upon and crushed him. It was customary to use strips between the tiers of boards standing by each other to prevent falling over, but no such precaution had ever been taken by defendant in the particular shed. The deceased had nothing to do with piling the tier of boards which fell over. He had not been in the shed before for some time. The particular pile was rather higher than usual. Commonly carpenters would go into the shed and, by taking boards out of the piles, disturb their order, somewhat, and leave them, which was liable to make such piles unstable. The condition of the particular pile, and those in the vicinity, was plain to be seen by a person circumstanced as deceased was. He was familiar with work of the kind he was engaged in when the accident occurred. It was in the regular line of his duty as foreman of the yard gang having to do with such work.

At the close of the evidence, the court directed a verdict in favor of the defendant upon the ground that the deceased was engaged in interstate commerce when he was injured and he assumed whatever risk there was growing out of the manner the lumber was piled. Judgment was rendered for defendant on the directed verdict.

For the appellant there was a brief by *Donovan & Gleiss,* attorneys, and *Grady, Farnsworth & Kenney,* of counsel, and oral argument by *W. H. Farnsworth* and *Wm. M. Gleiss.*

For the respondent there was a brief by *C. H. Van Alstine* and *H. J. Killilea,* and oral argument by *Mr. Killilea.*

MARSHALL, J. The question presented here is this: Is labor in the preparation of material or articles designed to be, when ready therefor, transported from the state where such labor is performed to another state, for use of the carrier when needed, a part of interstate commerce?

In deciding the question suggested, it will promote clearness to abstain from more than referring, briefly, to cases where the federal supreme court has had to do with the matter. There are several classes,—those which deal with labor on instrumentalities of interstate transportation; those which deal with subjects of interstate commerce; those which deal with prospective subjects of interstate transportation, and others. Authorities as to one class, often do not aid much, if at all, in solving a controversy falling within another. Here we have to deal with, *When do movables become the subject of interstate commerce so that work in respect thereto is a part of such commerce? Do they so become while the work of preparation therefor is still in progress?* If so, it is easy to see that such commerce reaches out so far as to include a large part of manufacturing business. It would lead to the conclusion that whenever a person is at work in the production of anything for transportation outside his state, he is engaged in interstate commerce. That would include a miner working in the mines, lumbermen working in the woods, a factory employee, and any other of many classes of persons which might be named, in case of the purpose being to produce something for interstate transportation. That result would be so unreasonable as to condemn the idea utterly.

Without going into the technique of the matter, we will state our conclusion to be that work of preparing articles for interstate commerce is not a part of such commerce within the meaning of the federal Employers' Liability Act, and that such conclusion is required by the logic of *Shanks v. D., L. & W. R. Co.* 239 U. S. 556, 36 Sup. Ct. 168; *Coe v. Errol,* 116 U. S. 517, 6 Sup. Ct. 475; *The Daniel Ball,* 10 Wall. 557, 565; *U. S. v. E. C. Knight Co.* 156 U. S. 1, 15 Sup. Ct. 249; *Delaware, L. & W. R. Co. v. Yurkonis,* 238 U. S. 439, 35 Sup. Ct. 902; *Zavitovsky v. C., M. & St. P. R. Co.* 161 Wis. 461, 154 N. W. 974.

Delaware, L. & W. R. Co. v. Yurkonis is particularly in point. It was there held that an employee of a railroad, min-

ing coal with which to operate its locomotives used in interstate commerce, is not engaged in such commerce, or work so closely related to it as to be a part thereof.

Coe v. Errol seems to declare the rule we have stated. It excludes from the field of interstate transportation all preliminary work in putting property in a state of preparation and readiness therefor.

By leaving the matter concisely disposed of as we have, the federal supreme court, if it shall be called upon to deal with the matter, can do so with a minimum of labor, a clear understanding of the precise situation presented, and this court's opinion in respect thereto.

The trial court having erred in directing the verdict upon the ground that deceased, when injured, was engaged in interstate commerce, the judgment must be reversed unless it clearly appear to be right upon some other ground.

The defense of assumption of the risk was not available to defendant. Sub. (1), sec. 2394—1, Stats.

Under the comprehensive requirement of sec. 2394—48, Stats. 1915, as regards the duty of employers to protect their employees from danger of personal injury, the question of whether respondent was actionably negligent was for the jury. *Sparrow v. Menasha P. Co.* 154 Wis. 459, 143 N. W. 317; *Rosholt v. Worden-Allen Co.* 155 Wis. 168, 144 N. W. 650; *Kelly v. Kneeland-McLurg L. Co.* 161 Wis. 158, 152 N. W. 858.

The evidence showed that there were more than four employees working in the common employment. So the defense of contributory negligence was not available to respondent. Sub. (3), sec. 2394—1; *Rosholt v. Worden-Allen Co.* 155 Wis. 168, 144 N. W. 650.

If respondent was negligent, it was evidently because of failure to comply with sub. 1, sec. 2394—49, Stats., which was enacted for the safety of employees, and it is also evident that the deceased was neither a shop nor office employee. So

it does not seem material whether the case falls under sub. (3), sec. 2394—1, or sec. 1816, Stats. It falls under one or both. In neither case would the defense of assumption of the risk, or contributory negligence, be available to respondent. Therefore the judgment is wrong from any viewpoint we can take of it.

By the Court.—The judgment is reversed, and the cause remanded for a new trial.

EMERSON-BRANTINGHAM IMPLEMENT COMPANY, Appellant, vs. PAUL, Respondent.

May 25—June 13, 1916.

Chattel mortgages: Affidavit after sale: Requirements: Penalty.

Under sec. 2316c, Stats. 1915,—providing that whenever property covered by a chattel mortgage shall be taken and sold thereunder, the owner of the mortgage shall, within ten days after the sale, file an affidavit setting forth, among other things, "a statement in detail of the expenses of such sale, including the cost of taking and keeping the property pending the sale," and that "a copy of the notice of sale if any shall be attached to said affidavit,"—the requirements as to a *detailed* statement of expenses and as to the copy of the notice are both important, and a failure to comply therewith operates to satisfy the debt and cancel the mortgage.

APPEAL from a judgment of the circuit court for Green Lake county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

This is an action to recover the balance due on certain notes given for the purchase price of a traction engine. The defendant is not the maker of the notes, but it is alleged that he promised in writing to pay them.

The defendant's son purchased a traction engine from the plaintiff for the sum of $2,190 in September, 1912. He

turned in an old engine and made some payments in cash, in all amounting to the sum of $595. He gave notes for the balance of the purchase price. The plaintiff claims that the father, the defendant here, had agreed to sign the notes with the son at the time of the sale of the engine, but refused to so sign when the plaintiff offered to deliver the engine at the farm of defendant. It also appears that plaintiff's agent then threatened to take the engine back to the factory. After further negotiations the defendant signed the following writing:

"I will not sign the notes for my boy, John F. Paul, for engine No. 6896, but I will help him and will see that he pays the notes when due, and will pay the notes if he don't."

Delivery of the engine was therefore made to the son, who used it for one threshing season. He defaulted in making payment of the note first due. In September, 1913, the plaintiff company took the engine under a chattel mortgage it held on the property to secure the payment of the balance of the purchase price. The engine was sold after seizure and was bid in by the plaintiff for the sum of $850. The mortgage provided that at any sale the mortgagee, its successors or assigns might become the purchaser of said property. Within ten days after the sale of the engine F. W. Morgan, acting as agent for the plaintiff to sell the engine, filed with the proper officer an affidavit of the chattel mortgage sale and a statement of the expenses of the sale as follows: "Posting notice of sale, livery, and expenses, $10. Expenses of taking and keeping property pending sale, $24. Total expense, $34,"—but did not attach a copy of the notice of sale. The proceeds of the sale, after deducting the expense thereof, were applied on the notes, and this action was brought to recover the amount still remaining unpaid on the notes.

At the close of the plaintiff's testimony the court awarded a nonsuit upon the ground that plaintiff failed to file a proper affidavit with notice of sale attached of the chattel

mortgage sale, and entered judgment dismissing the complaint and for the costs and disbursements of the action. From such judgment this appeal is taken.

For the appellant there was a brief by *E. W. Phelps* and *L. E. Lurvey,* and oral argument by *Mr. Lurvey.*

For the respondent there was a brief by *Lehner & Lehner,* and oral argument by *Philip Lehner.*

SIEBECKER, J. By sec. 2316*c,* Stats. 1915, it is provided that whenever the owner of a chattel mortgage shall take and sell the chattels covered by the mortgage he shall within ten days after the sale "make and file an affidavit setting forth," among other things, "a statement in detail of the expenses of such sale including the cost of taking and keeping the property pending the sale. A copy of the notice of sale if any shall be attached to said affidavit and be deemed a part thereof." This court, in *Hammel v. Cairnes,* 129 Wis. 125, 107 N. W. 1089, declared: "The statute under consideration is not only highly penal, but drastic in its character;" and "It is well settled that such statutes should receive strict construction in order to avoid forfeiture, if such can be done without doing violence to the language of the statute." In *Schoenmann v. Hood,* 145 Wis. 241, 130 N. W. 101, the court states that the legislative object cannot be ignored and "the courts must . . . enforce it as it stands and award to all persons within its purview . . . whatever rights they may have acquired under it." The affidavit herein filed contains this: "Posting notice of sale, livery, and expenses, $10. Expenses of taking and keeping property pending sale, $24. Total expense, $34." There is no detail specification of the items of either charge, though it is admitted by the affiant that each amount includes different items disbursed by the agent of the plaintiff. Concededly there is no copy of the notice of sale attached to the affidavit. The claim that these defaults in complying with the statute are

unimportant and did not prejudice the defendant in any way is not well founded. These requirements are equally as important as any other to meet the calls of the statute. The trial court very properly held: "The itemization of expenses would seem to be as fruitful of good and as much likely to prevent oppression and injustice as any other requirement, and no doubt the purpose of the statute was to prevent oppression and overreaching by requiring fullest publicity." The filing of a copy of a notice of sale is very useful to show that the sale was properly advertised to attract prospective bidders. We are left wholly without information what the notice contained both as to form and substance. It is not known whether it was a notice which apprised the public of the nature of the property or of the conditions of the sale. The plaintiff was clearly in default in these respects and thus deprived the mortgagor of the benefits of the provision of the statute. It is considered that the circuit court properly ruled that the failure of the mortgagee to comply with this statute operated to satisfy the debt and cancel the mortgage.

By the Court.—The judgment appealed from is affirmed.

RIPON HARDWARE COMPANY, Appellant, vs. HAAS and others, Respondents.

May 26—June 13, 1916.

Fraudulent conveyances: Husband and wife: Intent: Appeal: Review: Findings of fact: Inferences.

1. **Findings by the trial court to the effect that conveyances by husband to wife were not made with any fraudulent intent, but solely in pursuance of his idea to retire from business and provide for the disposition of his estate during his life, are *held* to be sustained by the evidence.**
2. **Inferences of fact drawn from the evidence by the trial court will not be disturbed unless clearly wrong.**

APPEAL from a judgment of the circuit court for Fond du Lac county: A. H. REID, Judge. *Affirmed.*

Action to set aside conveyances from husband to wife as fraudulent. This case was here on a former appeal and is reported in 157 Wis. 466, 145 N. W. 1096, to which reference is made for a complete statement of facts. The liability of the deceased was predicated upon a guaranty of a note given August 22, 1901, as follows:

"For value received we hereby guarantee the payment of the within note at maturity or at any time thereafter, with interest at the rate of six per cent. per annum until paid, waiving notice of nonpayment and protest."

The guaranty was signed by the deceased and two other guarantors. On the former appeal the judgment in favor of the plaintiff was reversed and the cause remanded, and a new trial was had on the question as to whether or not the deceased made the conveyances in question with fraudulent intent. Upon that question the trial court found:

"That taking into consideration the decision of the supreme court already made in this case, and sec. 2323, R. S., providing that 'the question of fraudulent intent in all cases arising under the provisions of this title shall be deemed a question of fact, and not a question of law, nor shall any conveyance or charge be adjudged fraudulent as against creditors or purchasers, solely on the ground that it was not founded on a valuable consideration,' I find that the evidence falls far short of convincing me that a fraudulent intent was present in the making of the conveyances to *Theresa Haas.* These conveyances to the said *Theresa Haas,* together with the conveyances to the said *C. J. Haas,* resulting in a gradual turning over of all of the property of the said John Haas, appear to me to have been made by him solely in pursuance of an idea of his to retire from business and secure release from business cares, and provide for the disposition of his estate during his life instead of after his death. I therefore find that there was no fraudulent intent on the part of either John Haas or *Theresa Haas* as to any or all of the transfers of real estate sought to be attacked by the complaint in the above entitled action.

"That at the time of the making of these various conveyances, the said John Haas appears to have had no occasion to believe that the note of Dodge to Cowan would not be paid, and that he was not advised that it was not paid when due. That he was wealthy enough so that he did not need to worry about the loss on this note, if it should occur. That there is nothing to indicate that he had the note in mind at all. That while the conveyances to his wife and son were not recorded, they were not otherwise made under circumstances of secrecy. That on the contrary they were made openly, and that the execution thereof was perfected at the bank where Mr. Cowan, the holder of the Dodge note, was in active management, and that the conveyances in August, 1902, were made almost simultaneously with the collection by the cashier of the bank of the annual interest on the Dodge note. That said conveyances were certified by the same cashier as notary. That the brewery business was immediately thereafter carried on in the name of C. J. Haas, and that all of the banking in respect thereto was done at the German National Bank of Ripon, and that thus the changes in titles to property and business were openly brought to the attention of Mr. Cowan, rather than secreted from him, and that I am satisfied that John Haas had no thought in his mind concerning his liability on the guaranty of the Dodge note, when he made the conveyances in question. That it further appears that after the making of the last conveyances to his wife, *Theresa Haas,* on August 29, 1902, the said John Haas still retained mortgages worth in excess of $12,000, and the Crowther parcel of real estate worth at least $1,000, and a bank account of $358, and that for several years thereafter he continued to hold property in the form of mortgages and bank account, and certificates of deposit, in an amount amply sufficient to discharge his liability on the Dodge note."

The defendant had judgment accordingly, and plaintiff brings this appeal.

For the appellant there was a brief by *Carter & Pedrick,* attorneys, and *Maurice McKenna,* of counsel, and oral argument by *S. M. Pedrick.*

For the respondents there were briefs by *Morse & Chad-*

bourne, attorneys, and *Thompson, Thompson, Allen & Gruenewald,* of counsel, and oral argument by *Roy L. Morse* and *J. C. Thompson.*

ROSENBERRY, J. The only question presented is whether or not the evidence sustains the findings of the trial court. We have carefully examined the evidence and we think the findings are in accordance with the great preponderance thereof. Counsel for plaintiff contend that because the court found as a fact that the conveyances sought to be set aside were made by the deceased, John Haas, "solely in pursuance of an idea of his to retire from business" and "provide for the disposition of his estate during his life," all the conveyances were made pursuant to a plan or scheme; that the last conveyance, as they claim, left him practically insolvent and was therefore fraudulent, and that in consequence all the transactions made pursuant to the plan were fraudulent, including those sought to be set aside.

The conclusion reached by counsel is an inference of fact from the evidence. The trial court made an opposite deduction or inference from the evidence. Inferences drawn from the evidence by the trial court will not be disturbed unless clearly wrong. *Will of Mitchell,* 157 Wis. 327, 147 N. W. 332; *Spuhr v. Kolb,* 111 Wis. 119, 86 N. W. 562. In this respect there is no difference between inferences and facts, if indeed there is a substantial difference in any respect. 1 Wigmore, Ev. § 30 *et seq.*

By the Court.—Judgment affirmed.

HAMMOND-CHANDLER LUMBER COMPANY and another, Appellants, vs. INDUSTRIAL COMMISSION OF WISCONSIN and another, Respondents.

SAME, Respondents, vs. INDUSTRIAL COMMISSION OF WISCONSIN, Appellant.

May 26—June 13, 1916.

Appeal: By whom taken: Dismissal: Appealable orders: Summons signed by nonresident attorneys: Amendment: Jurisdiction: What defects curable: Workmen's compensation: Action to review award: Service of summons on industrial commission and on claimant.

1. Only a party aggrieved by a judgment can appeal therefrom.
2. Where a party to an action, who is not aggrieved by the judgment rendered therein, appeals therefrom, the appeal should be dismissed.
3. An order denying a motion to set aside a summons is not appealable.
4. If, notwithstanding denial of the motion of one party defendant to set aside the summons and dismiss the proceedings, a like motion by a codefendant is granted and a judgment of dismissal is rendered, the one whose motion was denied cannot appeal from such judgment as an aggrieved party.
5. A summons signed by nonresident attorneys is not wholly void; it is only irregular and the service thereof affords the court jurisdiction to allow such summons to be perfected by amendment.
6. The rule that a matter which is wholly void cannot be amended does not extend to irregularities, not going to jurisdiction, which are amendable under sec. 2830, Stats., for the purpose and subject to the conditions and restrictions therein mentioned.
7. Under sec. 2830, Stats., the only limit to the power of amendment, when applied for in due course, is that it must be exercised "in furtherance of justice," the only condition of such exercise is that it must be upon such terms as may be just, and the scope of it includes all proceedings in any action and mistakes in any respect.
8. The rule that a void proceeding is not amendable applies only where there was no power to do the thing attempted to be done in a defective manner; given power to do the thing, and a good-faith, but defective way of doing it, and the infirmity is curable by amendment under sec. 2830, Stats., for the purposes, and subject to the condition and restrictions therein mentioned.

9. The language of sec. 2394—19, Stats., to the effect that service upon the industrial commission in a specified way shall be deemed a completed service, relates only to service on the commission.

10. The requirement of sec. 2394—19 that the adverse party shall be joined as a defendant with the industrial commission, by necessary implication, requires service of the summons to be made upon such party, and that he be accorded all rights of a defendant, in an action.

[Syllabus by MARSHALL, J.]

APPEALS from a judgment and order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Judgment reversed; one appeal dismissed.*

Action to set aside an award of the *Industrial Commission,* made in due course, on account of the injury and death of John G. Peterson.

Mr. Peterson was injured while engaged at his work as an employee of plaintiff *Hammond-Chandler Lumber Company,* which was subject to the Workmen's Compensation Act, and was insured against losses within the scope of such act by plaintiff *Lumbermen's Mutual Casualty Company.* Peterson died from his injury. Such proceedings were thereafter duly taken, upon the application of defendant *Nelson,* as guardian of the minor son of deceased, that the *Industrial Commission* awarded compensation for such injury and death. The award was made August 15, 1915. September 15th, thereafter, by a summons and complaint in due form, but signed by nonresident attorneys having their place of business at Minneapolis, Minnesota, the *Lumber Company* attempted to commence an action in the circuit court for Dane county, Wisconsin, to set aside such award. S. M. Wilcox, member of the *Industrial Commission,* by a writing indorsed on the papers, admitted service of a copy thereof. The attorney for the applicant verbally agreed to accept service of such papers for him with the same effect as if they were served on such applicant, personally, and pursuant thereto a copy there-

of was sent to such attorney, by mail, and received. The *Industrial Commission* appeared specially in the circuit court and moved to quash the summons upon the ground that it was not issued by any person or persons authorized to issue summonses in this state. The applicant likewise appeared and moved the court. October 27, 1915, a decision was announced that the motion of the *Industrial Commission* would be denied upon the ground that it waived the defect in the summons by one of its members signing the admission of service. January 6, 1916, the court announced a decision that the motion of the applicant would be granted upon the ground that no such summons as the statute requires was served on him, and there was no waiver of such service. The next day proceedings were duly commenced to obtain an amendment perfecting the summons and complaint by adding the name and residence of a Wisconsin attorney. The motion in respect to the matter was seasonably heard. It was supported by proof that the irregularity in the summons was the result of excusable neglect and that some of the attorneys who did sign formerly were members of the bar of Wisconsin, and that their names still remained on the official roll of attorneys of such bar. February 2, 1916, a formal order was entered denying the motion of the *Industrial Commission* to quash the summons and granting the like motion of the applicant, and judgment was rendered dismissing the action.

The plaintiff appealed from that part of the judgment which denied the motion to amend, that part which granted the motion to quash, and that part dismissing the action. The *Industrial Commission* appealed from that part of the judgment denying its motion to quash.

For the plaintiffs there was a brief by *Adams, Crews, Bobb & Wescott* and *C. R. Welton,* and oral argument by *Mr. Dwight S. Bobb* and *Mr. Welton.*

For the defendant *Industrial Commission of Wisconsin* as respondent there was a brief by the *Attorney General* and

Winfield W. Gilman, assistant attorney general, which brief was adopted, on behalf of defendant and respondent *Nelson,* general guardian, by *Olin, Butler, Stebbins & Stroud.* There was also a separate brief for the defendant *Industrial Commission of Wisconsin* as appellant by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general. The cause was argued orally by *Mr. Gilman* and *Mr. Byron H. Stebbins.*

MARSHALL, J. Only a party aggrieved by a judgment can appeal therefrom. *Powers v. Powers,* 145 Wis. 671, 130 N. W. 888; *Larson v. Oisefos,* 118 Wis. 368, 95 N. W. 399. Where the party appealing is not in any way aggrieved, the appeal should be dismissed. *Amory v. Amory,* 26 Wis. 152.

We are unable to discover wherein the *Industrial Commission* is aggrieved here. It could not have appealed from the order denying its motion to set aside the summons because such an order does not fall within the appeal statute, sec. 3069. It is not prejudiced by the judgment because, thereby, it, indirectly, obtained what it sought by its motion. Really, it finds no fault with the judgment and desires to have it affirmed.

For the reasons stated the appeal by the *Industrial Commission* must be dismissed. That does not militate against it, as respondent on the appeal by the *Lumber Company* and the *Casualty Company,* contending for an affirmance of the judgment upon the ground that it is right, whether rightly grounded by the trial court or not.

The idea which prevailed below was that a summons, signed by nonresident attorneys, is wholly void, not merely irregular and within the amendable defects provided for by sec. 2830, Stats., reliance being placed on *Whitney v. Brunette,* 15 Wis. 61, 70. It was there said, by Mr. Justice PAINE, that a matter which is wholly void is not subject to amendment under the statute. The remark was not neces-

sary to the decision and not concurred in by Chief Justice DIXON. It voiced a common-law rule which was, in great measure, at least, displaced by the Code. It has not been applied except in very extreme cases though, instead of being rejected or modified, expressly, it has been rendered quite harmless by defects, in most cases, being classed as irregularities, and hence subject to be disregarded under sec. 2829, Stats., or to be cured by amendment under sec. 2830, Stats.

The latter section, in its letter, is very broad. It should be read in its broad scope to effect the evident remedial purpose and spirit of the Code, which was to abolish, utterly, the practice which often had enabled a party to vexatiously prolong litigation and defeat justice, or render its attainment attended by unreasonably burdensome public and private expense. Under such section the only limit of the power of amendment is that it must be exercised "in furtherance of justice" and the only condition of the exercise of such power is that it shall be "upon such terms as may be just" and the scope of it includes all proceedings in any action and a mistake in any respect. If its plain language and purpose had been given effect by reference thereto in treating defects of the nature that we now have to deal with, there would be no doubt as to whether such defects fall within its beneficent provisions and, if necessary for harmony that they should be treated as rendering the proceeding affected merely irregular instead of a nullity. The statute itself makes no distinction and courts should not, within the scope of power, to do the thing, defectively done.

That the statute should be dealt with as suggested, there are many illustrations in our decisions. *Smith v. Smith,* 19 Wis. 522; *Morgan v. Bishop,* 61 Wis. 407, 21 N. W. 263; *Ill. S. Co. v. Budzisz,* 106 Wis. 499, 82 N. W. 534; *Gates v. Paul,* 117 Wis. 170, 94 N. W. 55.

We might extend this opinion to a very great length by citing and discussing authorities dealing with defects in sum-

monses. In almost every case where Code authority existed, as here, the defects were held curable by amendment. In a review of authorities in 1 Ency. Pl. & Pr. 658, it is well said that "By the common law, process was not amendable where it appeared upon the face of it that it was absolutely void. . . ." An amendment would be allowed where there was anything to amend by, "but . . . amendments have been allowed where there was nothing to amend by." "Under the modern statutes authorizing amendments . . . an amendment will generally be allowed whenever it is in furtherance of justice, if the court has jurisdiction of the parties and of the action in which the amendment is sought to be made." In this connection, it must be kept in mind that an irregularity does not go to jurisdiction, and that, if a party is brought into court in an irregular way, the court thereby obtains jurisdiction, at least, to cure the irregularity, under sec. 2830, Stats.

A summons is not a process,—it is a mere statutory notice. *Rahn v. Gunnison,* 12 Wis. 528. The summons in this case was regular in every way except for not being signed by Wisconsin attorneys with their address specified. The defendants were not misled in any way. There was power to do what was done, and hence the defective manner of doing it should not render it, necessarily, classable with absolutely void things to which the doctrine announced by Mr. Justice PAINE in *Whitney v. Brunette* should be strictly confined.

What has been said does not seem to need support by authority, but if it were otherwise, *Prentice v. Stefan,* 72 Wis. 151, 39 N. W. 364, and *Harvey v. C. & N. W. R. Co.* 148 Wis. 391, 134 N. W. 839, are ample. In each the defect was treated as a curable irregularity which did not go to jurisdiction. In the latter, the summons was treated as not having been signed at all and yet as not jurisdictionally defective. Certainly, if a summons so defective is good for jurisdiction if served under such circumstances as to inform the defend-

ant who the adverse party is, and the court invoked, a summons such as there was in this case, is good to the same extent.

Our conclusion is that the rule that a void proceeding is not amendable applies only where there is no power to do the thing which was attempted to be done; that, given power to do the thing, and a good-faith, but defective way of doing it, as in this case, and the infirmity is curable by amendment under sec. 2830, Stats., for the purpose and subject to the condition and restrictions mentioned therein; that courts should deal with the statute in a broad way so as best to promote the attainment of justice,—not narrowly so as to minimize its scope to less than that covered by its letter.

Sec. 2394—19, Stats., which provides for the commencement and prosecution of such actions as this, limits the time of commencement to twenty days from the date of the award, requires the *Industrial Commission* and the persons interested in supporting the award to be made parties defendant, and makes "service upon the secretary of the commission, or any member of the commission, . . . completed service." The language of the statute is somewhat ambiguous, in that, while it requires the "adverse party," meaning the one in whose favor the award was made, to be made a defendant, and provides, specially, for service on the commission, it is silent as to service on such adverse party and says of that on the commission, in the manner specified, "shall be deemed completed service." However, it is considered that, by necessary inference, the legislature contemplated that the action would be governed by the general provisions of the Code where not otherwise provided. It would be unreasonable, if not absurd, to require the claimant under the award to be made a party defendant with no obligation to make service on him as a jurisdictional requisite to his being afforded his day in court. The fair meaning of the statute is that service on the commission in the manner specified "shall be deemed completed serv-

ice" on it, and that the requirement as to making the "adverse party" a defendant includes that of making service on such party as in ordinary cases.

What has been said sufficiently covers the contention that the application to allow the summons to be perfected by amendment was properly denied, because the time for commencing the action was limited to twenty days and without a proper summons there could be no action started within that time. A mere irregular manner of commencing the action is one thing, and a far different thing from not commencing an action at all. If jurisdiction attaches within the prescribed time, that is sufficient. This is in harmony with *Telford v. Ashland,* 100 Wis. 238, 75 N. W. 1006, and *Relyea v. Tomahawk P. & P. Co.* 102 Wis. 301, 78 N. W. 412, and other cases to which our attention is called.

It is finally claimed by respondents that the judgment should be affirmed upon the ground that it would have been the duty of the court to have denied the application to amend, on the merits, because of the long delay in making it. It seems otherwise. Appellant supposed, and not without reason, that the service made would be held sufficient, up to a day before the application for leave to amend was made. There was no inexcusable delay and no delay which materially prejudiced respondents. We may well assume that had the trial court supposed it possessed power to allow the summons to be perfected, that power would have been exercised on such terms as would be just.

By the Court.—The appeal of the *Industrial Commission* is dismissed. The judgment is reversed on the appeal of the *Hammond-Chandler Lumber Company* and *Lumbermen's Mutual Casualty Company* without costs, and the cause is remanded with directions to vacate the order, entered on the motion of defendant *Nelson,* quashing the summons and for further proceedings according to law.

PIPER, Plaintiff in error, vs. THE STATE, Defendant in error.

May 26—June 13, 1916.

Criminal law: Physicians and surgeons: Practicing without license: Prosecution: Counsel assisting district attorney: Appeal and error: Complaint: Sufficiency: Constitutional law: Statute defining practice of medicine: Classification: Equal protection of the laws: Trial by jury.

1. Under sub. 9, sec. 1436, Stats. 1915, the attorney retained by the state board of medical examiners may, with the consent of the court and the district attorney, assist the district attorney in prosecutions for practicing medicine without a license.
2. The fact that such attorney of the board had assisted the district attorney in a prosecution in the district court before said statute was enacted is not an available objection upon review in the supreme court of a judgment of conviction in the Milwaukee municipal court, in which latter court the case was tried on appeal, after the statute took effect, upon the record returned from the district court.
3. In a prosecution for practicing medicine and surgery without a license, where the complaint sets out every element of the offense defined by the statute, it need not also state that defendant does not belong to any of the classes of medical and surgical practitioners who are exempted from the law by another section of the statute, that being a matter of defense.
4. The complaint in such a case may charge the commission of the offense on "information and belief."
5. Sec. 1435*f*, Stats. 1913,—which declared in substance that every person should be regarded as practicing medicine, surgery, or osteopathy who should append to his name certain words or letters or any other title, letters, or designation which represented or might tend to represent him as engaged in such practice, or who should for a fee prescribe or recommend any drugs or other medical or surgical treatment or osteopathic manipulation for the cure or relief of any bodily injury, infirmity, or disease,—did not make any arbitrary or unlawful classification, nor deprive any person of rights guaranteed by sec. 1, amendm. XIV, Const. of U. S., or sec. 11, art. I, Const. of Wis.; nor does anything in said statute conflict with the right of trial by jury guaranteed by sec. 5, art. I, Const. of Wis.

ERROR to review a judgment of the municipal court of Milwaukee county: A. C. BACKUS, Judge. *Affirmed.*

The plaintiff in error (hereinafter called the defendant) was convicted in the municipal court of Milwaukee county of practicing medicine without a license. Judgment was entered imposing a fine of $50 and costs of the suit, and in default of the payment of these sums that the defendant be committed to the house of correction of Milwaukee county until the fine and costs are paid or he be discharged, but such imprisonment not to exceed in all four months.

On December 14, 1914, a complaint was filed in the district court of Milwaukee county charging the defendant with having unlawfully practiced medicine and surgery. A warrant was issued on this complaint and the defendant appeared and pleaded not guilty. The case was tried by a jury of six in the district court January 29, 1915. Before trial the defendant was granted leave to withdraw his plea of not guilty and to file a plea in abatement, which was overruled, whereupon the plea of not guilty was again entered. Upon application of the district attorney, Mr. Umbreit, the attorney for the state board of medical examiners, was permitted by the court to assist the district attorney in the trial of the case. The written objections of defendant to Mr. Umbreit's assisting in the trial of the case were overruled. On February 19th the jury returned a sealed verdict finding the defendant guilty of the charge. Defendant then filed a motion for a new trial, which was denied. He thereupon filed a written motion in arrest of judgment, which was also denied. The district court awarded judgment on the verdict, imposing a fine of $50 and costs, and in default of payment that defendant be imprisoned in the house of correction for a term not exceeding four months. From this judgment an appeal was taken to the municipal court.

On November 13, 1915, a stipulation was received and filed for trial of the case in the municipal court without a jury, upon the record as returned from the district court. Mr. Umbreit, on motion of the district attorney, was ap-

pointed as special counsel to assist in the prosecution of the case. The case was submitted, and on November 22, 1915, the municipal court found the defendant guilty of the offense charged and entered judgment of conviction as above stated. Defendant filed a motion in arrest of judgment, which was denied. The defendant prosecutes this writ of error to review the judgment.

For the plaintiff in error there was a brief by *Lehr & Kiefer,* attorneys, and *J. Elmer Lehr,* of counsel, and oral argument by *J. Elmer Lehr.* They contended, *inter alia,* that sec. 1435*e,* Stats., contains the conditions under which a person may be permitted to practice medicine, and defines the offense. Sec. 1435*f* goes much farther and provides what acts shall be regarded as practicing medicine and surgery. The fact as to whether or not the defendant was practicing medicine in violation of sec. 1435*e* is a question of fact for the jury, and when the legislature attempted to say what acts constituted a violation of sec. 1435*e,* by enacting sec. 1435*f,* they excluded from consideration of the jury the question of fact which the defendant has a right to have the jury pass upon under sec. 5, art. I, Const. Sec. 1435*f* also violates sec. 1, amendm. XIV, Const. of U. S., and sec. 11, art. I, Const. of Wis. The legislature cannot define the practice of medicine or surgery for the purpose of an act forbidding such practice without a license. *State v. Biggs,* 133 N. C. 729, 46 S. E. 401, 64 L. R. A. 139; *Lawton v. Steele,* 152 U. S. 137, 14 Sup. Ct. 499.

For the defendant in error there was a brief by *A. C. Umbreit,* counsel, the *Attorney General,* and *W. C. Zabel,* district attorney for Milwaukee county, and oral argument by *Mr. Umbreit.* As to the constitutionality of the law they cited *Dent v. West Virginia,* 129 U. S. 114, 9 Sup. Ct. 231; *Hawker v. New York,* 170 U. S. 189, 18 Sup. Ct. 573; *Reetz v. Michigan,* 188 U. S. 505, 23 Sup. Ct. 390; *Collins v. Texas,* 223 U. S. 288, 32 Sup. Ct. 286; *State v. Heine-*

mann, 80 Wis. 253, 49 N. W. 818; *State ex rel. Kellogg v. Currens,* 111 Wis. 431, 87 N. W. 561; *Arnold v. Schmidt,* 155 Wis. 55, 143 N. W. 1055.

SIEBECKER, J. (1) It is contended that the municipal court erred in permitting the retained attorney of the board of medical examiners to assist the district attorney in the prosecution of the case. The record shows that the district attorney requested and the court appointed such attorney special district attorney for the prosecution of the case. The judgment of conviction from which defendant appeals was rendered on November 22, 1915, in municipal court. At this time sub. 9, sec. 1436, Stats. 1915, was in force and defines in part the power and duties of the Wisconsin state board of medical examiners, namely:

"To investigate all complaints in regard to the violation, noncompliance with or disregard of the provisions of sections 1435*a* to 1435*j*, inclusive, and to bring all such cases to the notice of the proper prosecuting officers, and to institute prosecutions for such violations, noncompliance, and disregard; and it shall be the duty of the district attorney of the proper county to prosecute all violations of said sections 1435*a* to 1435*j*, inclusive. In such prosecutions and with the consent of the court and the district attorney, the attorney retained by the board may assist the district attorney."

It is clear that this statute authorized such retained attorney to participate in the trial in municipal court as he did with the consent of the court and district attorney. The fact that such attorney appeared in the case in the district court before the statute was enacted is no objection on review of the judgment of the municipal court.

(2) The claim that the complaint fails to state an offense and that it is fatally defective because it does not set forth the classes of medical and surgical practitioners exempted from the law is not sustained. The complaint set out every element of the offense defined by the statute in conformity

with the rule applied in *Schaeffer v. State,* 113 Wis. 595, 89 N. W. 481. The exemptions specified by sec. 1435*d,* Stats. 1915, are in a separate section and need not be specified in the complaint; these are defensive matters. See *Splinter v. State,* 140 Wis. 567, 123 N. W. 97.

(3) It is urged that the complaint is defective because it charges the commission of the offense on "information and belief." This form of complaint has been held sufficient to meet the calls of statutes like those involved here. *State v. Davie,* 62 Wis. 305, 22 N. W. 411; *Murphy v. State,* 124 Wis. 635, 102 N. W. 1087.

(4) It is also contended that the provisions of sec. 1435*f,* Stats. 1913, arbitrarily attempt to define what is to constitute the practice of medicine and surgery and condemn practices which do not in substance constitute the practice of medicine and surgery and hence deprive persons of rights guaranteed them by sec. 1, amendm. XIV, of the federal constitution and secs. 5 and 11, art. I, of the state constitution. Defendant claims on this point that the provisions of sec. 1435*f,* Stats. 1913, which declare that all persons shall be regarded as practicing medicine, surgery, or osteopathy who shall append to their names the words or letters "'Doctor,' 'Dr.,' 'Professor,' 'Prof.,' 'Specialist,' 'M. D.,' 'M. B.,' or 'D. O.' or any other title letters, combination of letters or designation which in any way represents him or her, or may tend to represent him or her, as engaged in the practice of medicine, surgery, or osteopathy, in any of its branches, or who shall for a fee or for any compensation of any kind or nature whatsoever, prescribe or recommend for like use any drugs or other medical or surgical treatment or osteopathic manipulation, for the cure or relief of any wound, fracture, bodily injury, infirmity or disease, . . ." are an arbitrary and unlawful classification as medical and surgical practitioners of persons who are not necessarily engaged as such practitioners, and thus deprives them of the liberty to do these things, contrary to their constitutional rights. The contention over-

looks the provision that the use of the words or titles so appended to a name is denounced by the law whenever they represent or tend to represent the person as a practitioner of medicine, surgery, or osteopathy, or if he as such a practitioner does anything by way of treatment or gives a prescription for a fee. All the prohibited acts are limited to persons who in fact do these things as practitioners of medicine, surgery, or osteopathy. When so applied these regulations have been repeatedly held to be within the legislative power. *State v. Heinemann,* 80 Wis. 253, 49 N. W. 818; *State ex rel. Kellogg v. Currens,* 111 Wis. 431, 87 N. W. 561; *State ex rel. Milwaukee Med. Coll. v. Chittenden,* 127 Wis. 468, 107 N. W. 500; *Arnold v. Schmidt,* 155 Wis. 55, 143 N. W. 1055. We discover nothing in these provisions which conflicts with the right of trial by jury in cases arising under this law. The statute is a proper one for the regulation of the practice of medicine, surgery, or osteopathy, and the provisions accomplish this purpose in a reasonable way. The evidence before the court is sufficient to sustain the conviction. There is no reversible error in the record.

By the Court.—The judgment appealed from is affirmed.

ABALY, Plaintiff in error, vs. THE STATE, Defendant in error.

May 26—June 13, 1916.

Criminal law: Sodomy: Evidence: Competency: Other offenses: Reputation: Corroboration: Instructions to jury: Alibi: ***Unfair trial: Reversal of conviction.***

1. Upon a trial for sodomy, it was error to permit the defendant to be asked on cross-examination whether he did not have improper relations with a certain person, naming him, other than the complaining witness.

2. The state in making its case proved that the alleged offense was committed on March 13th and upon no other day. The main defense was an *alibi*, and there was strong evidence thereof. On rebuttal the state undertook to show that the complaining witness might have been mistaken as to the day and that the crime might have been committed on some other day. The court charged the jury that the vital question for them to determine was whether defendant committed the crime upon any day in March. *Held*, that even if there was no affirmative error in such charge (a point not decided) the jury should have been further instructed that if the testimony of the complaining witness was correct as to the date and if the evidence of an *alibi* was sufficient to prove the defendant's absence from the city on that date, or raised a reasonable doubt as to his presence, he was entitled to be acquitted.
3. It was error in this case to refuse a requested instruction to the effect that the jury should use great caution in weighing the testimony of the complaining witness, that it is ordinarily unsafe to convict upon the uncorroborated testimony of an accomplice, and that upon the actual commission of the crime charged the complaining witness was not corroborated by any other witness.
4. Testimony that the reputation of the defendant was bad was incompetent, where the witness based his opinion of such reputation upon stories and talk which he had heard after the prosecution had been commenced.
5. Where, upon the whole record, the supreme court is convinced that the defendant did not have a fair trial, and is unable to say that justice has been done, a new trial should be ordered.

ERROR to review a judgment of the circuit court for Richland county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

L. H. Bancroft, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General* and *J. F. Baker* and *J. E. Messerschmidt,* assistant attorneys general, and oral argument by *Mr. Messerschmidt.*

KERWIN, J. The plaintiff in error, hereinafter called the defendant, was convicted of an offense specified in sec. 4591, Stats. The case is here for review on errors assigned.

1. Error is assigned in permitting the prosecuting attorney to cross-examine the defendant upon matters not relevant to the issue. The offense was alleged to have been committed at Richland Center, Richland county, Wisconsin, with the complaining witness on the 13th day of March, 1915. The prosecuting attorney was permitted under objection, on cross-examination of defendant, to examine him at great length as to alleged conversations and relations with persons other than the complaining witness with whom it was alleged in the indictment he committed the offense charged. In pursuance of this cross-examination defendant was asked, among other things, whether he did not have improper relations with a certain person, naming him, other than the complaining witness. This was improper.

It is further assigned that the court erred in its charge to the jury. The state in making its case proved that the alleged offense was committed March 13, 1915, and upon no other day. After the defendant had proved by very strong evidence that he was not in Richland Center on the 13th, hence could not have committed the crime on that day, the state undertook to prove on rebuttal that the complaining witness might have been mistaken as to the day and that the crime might have been committed on some other day. The court charged the jury that the vital question for them to determine was whether the defendant committed the crime upon any day in the month of March. This charge is complained of. While we are of opinion that the charge was correct as an abstract rule of law, in the instant case we are not able to say that it did not prejudice the defendant.

The question whether the charge was misleading in view of the state of the evidence is not entirely clear. The evidence of the complaining witness is very positive that the offense was committed on the exact day named in the information. The defendant then introduced evidence tending to show that he was not in Richland Center at the time stated and the

alibi was the main defense. If the complaining witness's evidence was correct as to time of commission of the offense, then the question of particular date became more important than in the ordinary case, and if the evidence of the *alibi* were sufficient to prove the defendant's absence from the city on that particular date or raised a reasonable doubt as to his presence, the defendant was entitled to be acquitted.

Without holding that there was affirmative error in giving the instruction referred to, we think, in view of the state of the evidence, that there should be, in case of another trial, some such additional instruction as is suggested above.

The court charged the jury that it was for them to determine whether the evidence of the complaining witness was corroborated, and refused to give the instruction requested by counsel for defendant to the effect that in considering the testimony of the complaining witness the jury should use great caution in weighing his testimony, and that it is ordinarily unsafe to convict upon the uncorroborated testimony of an accomplice, and upon the actual commission of the crime charged against the defendant the complaining witness is not corroborated by any other witness.

It was prejudicial error to refuse this instruction. There was no evidence corroborating that of the complaining witness upon the actual commission of the crime charged. While one accused of crime may be convicted upon the testimony of an accomplice alone, there is often great danger of injustice being done the accused in convicting upon such evidence, and the court may properly direct an acquittal where the case of the state rests upon such evidence alone. *Porath v. State,* 90 Wis. 527, 63 N. W. 1061; *Ingalls v. State,* 48 Wis. 647, 4 N. W. 785; *Mack v. State,* 48 Wis. 271, 286, 4 N. W. 449; *Murphy v. State,* 124 Wis. 635, 102 N. W. 1087. In *Mercer v. Wright,* 3 Wis. 645, it was held that the jury ought not to convict upon the uncorroborated evidence of an accomplice but that they may lawfully do so.

A doctor was also permitted to testify that the reputation of defendant was bad, basing his opinion of defendant's reputation upon stories and talk which he had heard after the prosecution of this case had been commenced. This evidence was incompetent and should have been excluded.

Several other errors are assigned and discussed by counsel for defendant, but since they are not likely to occur upon another trial we shall not consider them. Sufficient has already been said to show that prejudicial error was committed upon the trial.

Upon the whole record we are convinced that the defendant did not have a fair trial and we are unable to say that justice was done him. Under such circumstances the defendant should have a new trial. *Prinslow v. State,* 140 Wis. 131, 121 N. W. 637; *Lonergan v. State,* 111 Wis. 453, 87 N. W. 455.

By the Court.—The judgment and conviction are reversed, and the cause remanded for a new trial.

STATE EX REL. GILBERT, Special Counsel, vs. PHILIPP and others.

May 26—June 13, 1916.

Normal schools: Appropriations: Building fund not depleted by unauthorized loan: Injunction.

Where a loan from the normal school building fund, for the purpose of improving an athletic field, was not authorized by law, such loan, though never repaid, did not in contemplation of law deplete the building fund; and the state board of education should not be restrained from contracting for the erection of a building on the ground that, because of the supposed depletion resulting from such loan, the building fund was insufficient.

ORIGINAL ACTION brought in this court to restrain the state board of education from contracting for the erection of

a physical education building at the La Crosse normal school to cost $80,000 for the alleged reason that there is only $71,360.98 in the building fund now available for such purpose. The petition for an injunction and the return thereto disclose the following facts: At the time of the commencement of this action there was, according to the records of the secretary of state, in the building fund of the La Crosse normal school created by sub. 2, sec. 406*a*, Stats. 1915, the sum of $26,360.98, and in the building fund created by sub. 37, sec. 172—54, Stats. 1915, the sum of $45,000. It also appears that in the autumn of 1914 the athletic field for the normal school was graded and improved at a cost of $9,465.17 and there being no funds then available in the land and land improvement fund created by sub. 22, sec. 172—54, Stats., the board of normal school regents, since succeeded by the defendants herein, pursuant to a resolution charged the same against the building fund created by sub. 2, sec. 406*a*, Stats. 1915, with the proviso that the bills for the same should after March 1, 1915, be transferred to the fund created by sub. 22, sec. 172—54, at which time there would be moneys in said fund under an appropriation then available. No part of the sum of $9,465.17 has ever been repaid to the building fund out of which it was taken.

Frank L. Gilbert, special counsel, for the *State.*

The *Attorney General* and *E. E. Brossard,* assistant attorney general, for the defendants.

VINJE, J. If the loan of $9,465.17 from the building fund created by sub. 2, sec. 406*a*, Stats. 1915, was not authorized, then, in contemplation of law, the money is still in that fund and the sum of $26,360 should be increased by $9,465.17, making $35,825.17, which added to the $45,000 in the fund created by sub. 37, sec. 172—54, makes a total of $80,825.17 in the building funds available for the construction of the building. We have not been referred to, and have been unable to find, any authority, statutory or other-

wise, for the attempted borrowing of the $9,465.17 from the building fund for the purpose of improving the athletic field. On the contrary, sec. 172—131, Stats. 1915, forbids the forestalling of appropriations or the diversion of funds. The board of regents having no authority to borrow from the building fund, the money was taken therefrom without legal warrant. When so taken the fund is not depleted. In contemplation of law the money is still in the fund for all legitimate purposes thereof. *Hohl v. Westford,* 33 Wis. 323; *School Districts v. Edwards,* 46 Wis. 150, 49 N. W. 968. It follows that there is a sufficient fund on hand to construct the building and that no injunction should issue.

By the Court.—Writ of injunction denied and complaint dismissed upon the merits.

STATE, Plaintiff in error, vs. PIERCE, Defendant in error.

May 27—June 13, 1916.

Constitutional law: Freedom of speech: Abridgment: Corrupt Practices Act: Validity.

1. By sec. 12.05, Stats. 1915, a mere private citizen, not a candidate or member of a personal or party committee, residing in one county, was forbidden to spend money in another county in investigating the governmental, political, and financial affairs of the state and communicating the results of his investigations to the electors of the state generally, for the purpose of influencing the voting at a general election.
2. In forbidding such acts said sec. 12.05 contravenes sec. 3, art. I, Const., which provides that "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press."
3. Said sec. 12.05 not having been the inducement to or the compensation for the remainder of the Corrupt Practices Act, its invalidity does not affect the validity of the other parts of the act.

SIEBECKER and KERWIN, JJ., dissent.

ERROR to review an order of the municipal court of Dane county: JOHN C. FEHLANDT, Judge. *Affirmed.*

The state brings this writ of error to reverse an order quashing an indictment for violation of the so-called "Corrupt Practices Act," being ch. 650 of the Laws of 1911 (now ch. 12, Stats. 1915).

This law is intended to prevent the profuse and corrupt expenditure of money during political campaigns as well as at elections or primaries. The first section of the act (sec. 12.01) contains definitions of certain terms used in the act and declares, among other things, that an act shall be deemed to have been done for "political purposes" when it is "of a nature, is done with the intent, or is done in such a way, as to influence or tend to influence, directly or indirectly, voting at any election or primary." Sec. 12.02 prohibits the knowing receipt of any money, property, or thing of value, or promise or pledge thereof, constituting a disbursement for political purposes contrary to law. Sec. 12.03 prohibits expenditures for political purposes by candidates except through a party committee or through his personal campaign committee. Sec. 12.04 provides for the appointment by a candidate of a personal campaign committee. Sec. 12.05, for violation of which this prosecution is brought, provides as follows:

"12.05 *Disbursements by persons other than candidates.* No person or group of persons, other than the candidate or his personal campaign committee or a party committee, shall make any disbursement for political purposes otherwise than through a personal campaign committee or a party committee, except that expenses incurred for rent of hall or other rooms, for hiring speakers, for printing, for postage, for telegraphing or telephoning, for advertising, for distributing printed matter, for clerical assistance and for hotel and traveling expenses, may be contributed and paid by a person or group of persons residing within the county where such expenses are incurred; and except that a speaker may pay his actual traveling expenses in going to and from meetings addressed by him."

Sec. 12.06 enumerates the political purposes for which a candidate may make disbursements. Sec. 12.07 enumerates the political purposes for which a party committee or personal campaign committee may make disbursements.

The act contains other sections limiting the amounts of expenditures by candidates, requiring the filing of accounts of receipts and disbursements both by candidates and committees, regulating the solicitation of contributions and the publication of political advertisements, and prescribing other limitations on the political activities of candidates and committees which are not deemed necessary to set forth at length.

The indictment contains four counts, the first charging a violation of sec. 12.05 by the making of unlawful expenditures for political purposes in the campaign preceding the primary election held September 1, 1914; the other counts charging like violations of the same section in the campaign preceding the general election in November, 1914, the second charging the expenditure of $150 August 27, 1914, the third charging the expenditure of $100 October 31, 1914, the fourth charging the expenditure of $1,000 between September 2 and November 3, 1914.

The counts are identical in language so far as the essential allegations are concerned, and the gist of each is that the defendant, being a citizen and resident of Rock county and not a candidate or member of a personal or party committee, unlawfully made the disbursements named for political purposes in the county of Dane, otherwise than through any personal or campaign committee and otherwise than as a speaker coming to and from meetings addressed by him, "said disbursements being made, ordered, directed, and caused to be made by said *Charles E. Pierce* in and about the collecting and gathering of facts and information concerning the political, governmental, and financial affairs of the government and administration of the state of Wisconsin and the public institutions of said state and its governmental departments, and communicating such information and facts not to or for

any political party in said state, but generally to the electors and taxpayers thereof, with the intent and for the purpose of influencing the voting at the general election held in said county of Dane and throughout the state of Wisconsin."

The *Attorney General, E. E. Brossard,* assistant attorney general, and *Harry Sauthoff,* district attorney, for the plaintiff in error.

For the defendant in error there were separate briefs by *Jeffris, Mouat, Oestreich & Avery,* attorneys, with *J. M. Clancey* and *T. C. Richmond,* of counsel; by *J. M. Clancey,* attorney, with *T. C. Richmond* and *O. A. Oestreich,* of counsel; and by *T. C. Richmond,* attorney, with *J. M. Clancey* and *Otto Oestreich,* of counsel; and the cause was argued orally by *Mr. O. A. Oestreich, Mr. Clancey, Mr. John B. Sanborn,* and *Mr. Richmond.*

WINSLOW, C. J. The indictment charges that *Mr. Pierce,* being a mere private citizen residing in Rock county and not a candidate or committeeman, spent money in Dane county in investigating the governmental, political, and financial affairs of the state and communicating the results of his investigations to the electors of the state generally, for the purpose of influencing the voting at the approaching election in Dane county. The communication must, of course, have been by word of mouth or by the circulation of printed matter.

These acts are said to be criminal because of the provisions of sec. 12.05 of the Corrupt Practices Act, which is quoted at length in the statement of facts.

The suggestion that these acts constitute crime is somewhat startling, but the state points to the fifth section of the Corrupt Practices Act (sec. 12.05, Stats. 1915), and upon consideration of this section it seems clear that it forbids such acts as are here alleged. The only question remaining, therefore, is the question whether the constitution permits such acts as are here alleged to be prohibited.

Freedom of speech and freedom of the press have always been supposed to be the very corner-stones of Anglo-Saxon democratic institutions. All of our state constitutions, as well as the federal constitution, expressly preserve these rights. The constitution of Wisconsin declares (sec. 3, art. I), "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, *and no laws shall be passed to restrain or abridge the liberty of speech or of the press.*"

This provision is somewhat more definite and sweeping than is contained in some of the constitutions. It declares that the freedom extends to "all subjects" and expressly prohibits the restraint or *abridgment* of that freedom. The ordinary meaning of the word *abridge* is to diminish or to lessen but not to cut off entirely.

The federal constitution (amendm. I) provides that "Congress shall make no law . . . abridging the freedom of speech or of the press."

The question presented is whether sec. 12.05 restrains or abridges the liberty of the citizen to freely speak and "publish his sentiments on all subjects."

We think there is no doubt that it does do so. Under its terms a man or body of men who are honestly convinced of the necessity of a change of policy in the state government commit a crime if they spend any money in another county than their own in bringing their views to the notice of the voters of such other county. There is really but one exception to this, and that is that a public speaker may pay his traveling expenses in going to and from his own meetings, but even he may not hire a hall in which to make his speech.

If this be not an abridgment of freedom of speech it would be difficult to imagine what would be. Under such a law no pioneer in any reform which depends for its success on a change in the law could leave his own county and communicate his sentiments at his own expense to his fellow citizens of other counties without committing a crime. Under such

laws no great propaganda for better laws and better political conditions which has not been formally taken up by a political party can ever be carried on, and the reformer whose eye kindles with the dawning light of a better day must be content to confine his personal activities to the inhabitants of his own small bailiwick. Almost every forward step in political and governmental affairs comes as the result of long agitation and discussion in the press, on the rostrum, and in the open forum of personal contact. This agitation and discussion often goes on for years before the idea is formally indorsed by any party. Yet it will generally be the case that during this period there will be individual candidates in one party or the other, or both, who favor the new thought. Now this law means that in such a situation no man or group of men can do a stroke of political work involving expense in any other county than their own, however legitimate and praiseworthy be the means which are used. No political committee will take up the work for the very good reason that the party organization has not indorsed the doctrine.

There are times also when devoted citizens firmly believe that no organized political party stands for the right or deserves support and that an independent candidacy is necessary. Can it be that under such circumstances these citizens can be wholly deprived of the right to go to any part of the state at their own expense, collect information on the subject, and endeavor by word of mouth or by the distribution of printed matter to put the issue as they see it before such fellow voters who are not residents of their own county?

We are very clearly of opinion that this question must be answered in the negative.

Mr. Pierce, according to the indictment, did this thing. He, being a resident of Rock county, spent money in Dane county in gathering facts concerning governmental affairs and in communicating those facts to the people of the state at large with the intent of influencing the voting at the ap-

proaching election. This cannot be made a criminal act while the constitutional guarantees of freedom of speech and freedom of the press remain as they now are.

We are by no means unmindful of the high and admirable purposes which inspired the authors of the Corrupt Practices Act. There is no member of this bench who is not in the fullest sympathy with any legislation which will tend to reduce to an absolute minimum the danger of corruption and coercion during political campaigns; but when such a law goes beyond regulation and absolutely prohibits that which the constitution expressly protects, the court can do nothing but say so.

This does not mean that the Corrupt Practices Act is invalid as a whole. We are now concerned with sec. 12.05 alone. We feel obliged to say that so far as it prohibits the doing of such acts as are charged in this indictment it violates the constitutional guarantees of freedom of speech and freedom of the press. We go no further. This section was certainly not the inducement to or the compensation for the balance of the law; in other words, we are well assured that the legislature would not have rejected the entire law had they realized that this section abridges the freedom of speech and freedom of the press in violation of the constitutional guarantees. The remaining sections of the law therefore are unaffected by this decision.

By the Court.—Order affirmed, and action remanded with directions to dismiss the same.

The following opinion was filed July 17, 1916:

SIEBECKER, J. (*dissenting*). The decision of the court approves the legislative propriety of enacting laws to prevent corrupt practices in elections in order to preserve the purity of the ballot. The American Congress, the English Parliament, and our state legislatures have exerted their legislative

powers for the accomplishment of this object by enacting such laws, some of which were enacted prior to the adoption of our state constitution. By these laws the expenditure of money in elections is attempted to be so regulated as to prevent the abuse and corruption of the elective franchise. The leading features of the acts are restrictions on contributions and expenditures, publicity thereof, and the imposition of penalties for violation of the prescribed regulations. The court holds that the provisions of sec. 12.05, Stats. 1915, of our act on this subject are invalid because they improperly "restrain or abridge the liberty of the citizen to freely speak and publish his sentiments on all subjects" as guaranteed by sec. 3, art. I, of the state constitution. The terms of sec. 12.05, Stats. 1915, are not, in my opinion, an invalid restraint or abridgment of these rights, in the light of an urgent necessity to regulate the mischievous expenditures of money in elections. It is important to observe that the statute does not regulate the expenditures of money by persons in their political activities, or in promulgating their sentiments and convictions on any subject or any policy of government disassociated from and independent of any activity of influencing voters in an election, and also that no person is precluded from participating as a speaker in political campaigning in elections and speaking his sentiments freely, except that when a person so participates as a speaker in an election campaign to influence voters he is required to file statements of his expenditures as such a speaker, or that he carry on his work at the expense of a party committee, a personal campaign committee, or a local county agency, who are required to file and make public all disbursements incurred by them for political purposes. Manifestly these regulations of carrying on political campaigns and requiring all persons engaged in them to comply with the provisions of this law were enacted for the purpose of controlling the expenditure of money in elections—an object clearly within the legislative

power. The act also permits the widest freedom to all persons and groups of persons to promote and agitate for any cause by the press and print through the mails at the place of their residence and thence throughout the state. This shows that the freedom of speech and press is wholly unaffected by the provisions of this act and is as unconfined as ever as to all matters other than campaigning for votes in an election, and in such campaigns all persons have the unrestricted liberty to speak throughout the state as they please and employ the mails of their counties and thence throughout the state to publish their sentiments and expound their doctrines, policies, and reforms concerning any cause. A very broad and unrestricted field for activity is thus available to every publicist, speaker, reformer, or any body of men honestly concerned with the necessity of bringing their views to the notice of voters of the state. I am unable to perceive how the requirements of this law, to give an account of the disbursements connected with such activities and to carry them on through the committees and local county groups in cases of political agitation, for the purpose of enabling the state to prevent corruption in elections, can be considered an invasion of the freedom of speech or press. Reasonable regulations to guard the ballot are necessary to prevent unbridled license in the exercise of these fundamental rights in order to maintain a government of laws. As above indicated, corrupt practices acts are enacted to remedy these evils, and the right of free speech and press does not imply that its inviolability is such that it can do no wrong. Indulgence of it is always conditioned on the proposition that its exercise does not subvert the government and is "limited, but not abridged, by laws passed in the exercise of the police power, for the protection of the moral health of the community." Black, Const. Law (3d ed.) p. 653; *State ex rel. Runge v. Anderson,* 100 Wis. 523, 76 N. W. 482; *State ex rel. Nordin v. Erickson,* 119 Minn. 152, 137 N. W. 385;

State v. Pioneer Press Co. 100 Minn. 173, 110 N. W. 867. The legislative provisions of sec. 12.05 are directed at the evils in elections and seek to correct them by limiting contributions and expenditures of money and by requiring all persons engaged in political campaigning to carry on their activities through the prescribed agencies of committees and local groups. To accomplish these purposes the legislature found it necessary and expedient to subject the citizen to these methods of campaigning, which in some measure operate to confine the rights of the freedom of speech and press in elections to the prescribed manner of exercising them. But such restrictions to secure the public welfare are implied in the very language of sec. 3, art. I, of our constitution, "Every person may freely speak, write and publish his sentiments on all subjects, *being responsible for the abuse of that right,* and no laws shall be passed to restrain or abridge the liberty of speech or of the press." This provision of the constitution in common with all other provisions is subordinate to the great leading purpose for which constitutional governments have been established, namely, to form a more perfect government and to promote the general welfare, and, like all fundamental rights, requires regulation to prevent these rights from being abused, which is the law of liberty. This doctrine is forcibly and clearly expressed in the words:

"Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the state and to determine primarily what measures are appropriate or needful for the protection of the political morals, the public health, or the public safety." *Mugler v. Kansas,* 123 U. S. 623, 660, 8 Sup. Ct. 273.

Where the abuse of the purity of elections begins, through whatever means it be accomplished, liberty of speech and press must end, for without such a check this right could be made a most effective instrument of mischief. The Corrupt Practices Act was framed to guard against such mischiefs, and the legislature found its provisions appropriate and necessary to check existing evils, which threatened to subvert the rights and privileges of the elective franchise. In the light of the public evils and the pernicious influence on voters in elections which flow from the lavish expenditure of money, there is much justice and sound public policy in the legislative restrictions imposed on persons by the Corrupt Practices Act. No doubt exertion of the legislative power in this regard has its difficulties and embarrassments in order to preserve and protect the elective franchise from abuse and the rights guaranteed by liberty of speech and press. I am unable to concur in the view of the court that the provisions of sec. 12.05, Stats. 1915, are an unconstitutional invasion of the rights of freedom of speech and press. The regulations and conditions of this section are appropriate, reasonable, and in the legislative discretion necessary means in the scheme of the law to eradicate existing evils in elections, and hence do not conflict with the rights of free speech and press. I consider the enactment of the law a proper exertion of the legislative power and within the discretion which obviously animated the legislators in their vigilance to correct existing mischiefs that threaten to subvert the purity of elections, and that its provisions do not operate to unreasonably restrain or abridge the liberty of speech and press in the light of eradicating the evils that have grown up in the political field from lavish expenditures of money which menace the freedom and purity of the ballot.

I am authorized to state that Mr. JUSTICE KERWIN concurs in this dissenting opinion.

STATE EX REL. CITY OF SUPERIOR VS. DONALD, Secretary of State.

May 27—June 13, 1916.

States: Appropriating state funds to local purposes: Constitutional law: Taxation: Uniformity: Railroad property: Classification: Tax derived from marine terminals: Distribution to municipalities.

1. Ch. 407, Laws 1915 (secs. 51.08, 51.29, 51.30, Stats. 1915),—providing for a separate valuation of "any docks, piers, wharves or grain elevators used in transferring freight or passengers between cars and vessels" which have been included in the value of a railroad company's property as a whole, and that the taxes paid by the company which are derived from or apportionable to such separately valued property shall be distributed to the municipalities respectively in which such property is located,—is not void on the ground that it appropriates money of the state to local purposes, since, if the law is otherwise valid, the moneys are not state funds but belong to the municipalities, though collected by the state as a matter of convenience.
2. Said statute does not in any way violate sec. 1, art. VIII, Const., which requires the rule of taxation to be uniform.
3. Nor is it in any sense a law "for assessment or collection of taxes," within the meaning of sub. 6, sec. 31, art. IV, Const., since it does not become effective for any substantial purpose until after the assessment and collection of the tax are fully completed.
4. Even if sec. 5, art. VIII, Const., limits state taxation to a sum sufficient to defray the estimated expenses of the state for the year, the statute does not violate that section, since the tax in question is simply collected by the state as agent of the municipality.
5. So far as the rate of the tax is concerned there can be no classification of railroad property or subjection of one part to a different rate from that to which the remainder is subjected.
6. But municipalities in which marine terminals are located being burdened with responsibilities, duties, and financial obligations not shared by municipalities possessing only ordinary railroad property, it cannot be said that the classification made by ch. 407, Laws 1915, is arbitrary or invalid.

MANDAMUS to the Secretary of State.

For the petitioner there was a brief by *H. V. Gard* and *T. L. McIntosh,* and oral argument by *Mr. Gard.*

There was also a brief by *Crownhart & Wylie,* of counsel for *City of Superior* and City of Ashland, and *W. Stanley Smith,* city attorney of Ashland, and oral argument by *Mr. C. H. Crownhart* and *Mr. Smith.*

For the City of Milwaukee, as *amicus curiæ,* the cause was submitted on the brief of *Clifton Williams,* city attorney, and *Garfield S. Canright,* assistant city attorney.

The *Attorney General* and *Winfield W. Gilman,* assistant attorney general, for the defendant.

WINSLOW, C. J. This is an action of *mandamus* brought originally in this court to compel the secretary of state to audit certain claims made by the city of *Superior* under the provisions of ch. 407, Laws 1915 (secs. 51.08, 51.29, 51.30, Stats. 1915). The defendant moves to quash the alternative writ.

The question presented is as to the constitutionality of the act named. The act provides in substance that after valuing the property of a railroad company as a whole the state tax commission shall make a separate valuation of "any docks, piers, wharves or grain elevators used in transferring freight or passengers between cars and vessels" which have been included in the value of the railroad property as a whole, and that the taxes paid by the company which are derived from or apportionable to such separately valued property on the basis of the separate valuation aforesaid shall be distributed to the towns, villages, and cities respectively in which such property is located.

The city of *Superior* in this action is attempting to enforce this law and compel the auditing officer of the state to audit its claims for those sums received by the state resulting from the taxation of railroads terminating at *Superior* which are apportionable to the dock, elevator, and wharf property located in that city and constituting the means of transfer of freight and passengers from railroad to ship and *vice versa.*

These claims are resisted on the ground that the law is un-

constitutional and void for the following reasons: (1) it appropriates money of the state for a local purpose and not a state-wide public purpose; (2) it violates sec. 1 of art. VIII of the state constitution, requiring the rule of taxation to be uniform; (3) it violates sub. 6 of sec. 31 of art. IV of the constitution, prohibiting the enactment of special laws for the assessment and collection of taxes; (4) it violates sec. 5 of art. VIII of the constitution, providing for the levy of an annual state tax sufficient to defray the estimated expenses of the state for the year. These contentions will be taken up in their order.

1. The first objection may be quickly disposed of by the self-evident proposition that if this legislation is otherwise valid, *i. e.* if there is no constitutional objection of any other nature which stands in the way, then these funds are not in any true sense state funds, but simply funds belonging to the city of *Superior* which have been collected by the state as a matter of convenience in the administration of the tax laws and are temporarily held by the state treasurer as custodian only for the city and are to be turned over to the owner upon proper demand. We pass, therefore, to the consideration of the other objections.

2. It is quite impossible for us to perceive in what way it can be argued that this legislation violates the rule of uniformity in taxation of property. This rule was placed in the constitution for the protection of the taxpayer so that there may be no discrimination in property taxation. There is none here. The law does not change in the least the taxpayer's burden. He pays exactly the same tribute whether his whole tax contribution remains in the state treasury or whether part of it goes to the city treasury. He has not been taxed at one rate on a part of his property and at a higher rate upon another part, as was the case prior to the passage of this law. *Minneapolis, St. P. & S. S. M. R. Co. v. Douglas Co.* 159 Wis. 408, 150 N. W. 422.

3. It is equally difficult for us to see how this law can be in any sense called a law for the assessment or collection of a tax. It does not become effective for any substantial purpose until after the assessment and collection of the tax are fully completed. The processes of assessment and collection remain the same in operation and in effect as before.

4. The fourth contention is answered by the same considerations which apply to the first contention. If this fund in fact belongs to the city and is simply collected by the state for convenience as the agent of the city, then of course there is no violation of the constitutional command that a tax sufficient to defray the estimated expenses of the state for the year shall be annually levied, conceding that this provision limits state taxation to that sum.

The difficult and serious questions in the case are whether there can be legal classification between ordinary railroad property and terminal facilities of this nature as well as between municipalities containing such terminal facilities and those containing only railroad property.

So far as the rate of the tax is concerned it is settled that there can be no classification of railroad property or subjection of one part to a different rate from that to which the balance is subjected. *Minneapolis, St. P. & S. S. M. R. Co. v. Douglas Co., supra.* But, as we have seen, there is no attempt to make a difference in the tax rate here. All railroad property is taxed at the same rate. This does not settle the question, however, whether the amount derived by taxation from such terminal facilities can be legally separated and returned to the municipalities, respectively, where such facilities are located, while other municipalities are given no part of the proceeds of railroad taxation. Is not this arbitrary discrimination and not proper classification, or, in other words, does not this result in an inequality of burden between municipalities or taxing units of the state?

In sustaining the validity of the law applying the system of *ad valorem* taxation to railway property and placing the entire proceeds in the state treasury for state purposes (*Chicago & N. W. R. Co. v. State,* 128 Wis. 553, 108 N. W. 557) it was held that the purpose of the law was to tax railway property on the same basis as other property throughout the state, and that the proceeds were to be regarded as, in effect, the result of all state and local taxation (except special assessments) and as taking the form of state funds by reason of a constructive accounting between the state and the localities. We are entirely satisfied with this construction and adhere strictly to it. Time has demonstrated, however, that this constructive accounting does not accurately work out the result intended at terminal cities such as *Superior,* where there must be a vastly expensive and entirely different class of terminal from the ordinary land terminal of a railway company. The most striking illustration of this fact is furnished by the situation at the city of *Superior* itself, where it appears that the total assessed valuation in 1915 was $34,258,688, of which $7,717,604, or 22½ per cent., was railroad wharfage property of this class.

That the possession and maintenance of such property imposes upon the municipality in which it is located an enormous and peculiar burden, financially greater and essentially different in some of its characteristics from the municipal burdens borne by inland municipalities, seems very clear. The annual requirements for dredging, policing, and otherwise maintaining a great harbor so that the change from land to marine carriage can successfully go on, is an onerous burden, and it may, we think, be properly considered as so peculiar in its nature as to rightly suggest that the proceeds of taxation derived from these expensive joint agencies of land and water commerce should be returned to the municipality which is under this peculiar burden while reaping little of benefit from its possession of them unless it be accom-

plished in this way. The legislature evidently concluded that the constructive accounting supposed to have been reached by the *ad valorem* law failed at this point, and passed the present law for the purpose of more perfectly fitting the fact to the theory and working out the constructive accounting principle with greater accuracy.

In order to set the legislative act aside we must be certain that there is no legal ground for classification here and hence that it accomplishes actual discrimination between the taxing units of the state.

After mature deliberation we cannot say that we feel certain of this. The terminal property named is certainly unique in character, and may reasonably be said to stand in a class by itself. It partakes equally of the character of land and of water transportation. Probably it was not thought of as an integral part of railroad property when the *ad valorem* law was passed.

Every municipality in which such property exists is burdened with responsibilities, duties, and financial obligations not shared by other municipalities possessing only the ordinary railroad property. We would not intimate for a moment that any other class of railroad property possesses such peculiar characteristics as would justify the classification here applied to marine terminals, but as to such terminals and the municipalities in which they are located we are unable to say that the classification is invalid.

By the Court.—Let the peremptory writ of *mandamus* issue as prayed, without costs.

STATE EX REL. TRUSTEES OF THE LA CROSSE PUBLIC LIBRARY, Appellant, vs. BENTLEY, Mayor, and others, Respondents.

May 27—June 13, 1916.

Taxation: Municipal corporations: Public purpose: Libraries: Statutes: Construction: Implied repeal: General law and special city charter.

1. The power of taxation cannot be conferred upon municipalities for other than public purposes.
2. The maintenance of public libraries is a public purpose, and municipalities may be authorized, as in sec. 931, Stats., to raise moneys therefor by taxation.
3. The authority given in said sec. 931 is not restricted to the support of libraries established under secs. 931–936*a;* but moneys may be raised and appropriated for the support of other public libraries which are free and serve the whole public in the same way as do those established under the law.
4. The fact that a public library was established and is administered by a private corporation, controlled by a board of trustees who, except that the mayor of the city is *ex officio* a member, appoint their own successors, does not preclude the city from appropriating to such corporation, for the support of the library, a library fund raised by taxation.
5. In determining whether a particular agency may be employed by the state or some particular subdivision thereof by legislative authorization to perform any particular work, the test is not whether the agency is public, but whether the purpose is public within the legitimate functions of our constitutional government.
6. Conflicts in statutes are to be avoided if that can be reasonably done; and a general statute is not to be construed as amending a special city charter if the two acts do not necessarily conflict in their operation.
7. The general law (sec. 931, Stats.) giving municipalities power to levy a tax to provide a library fund, does not conflict with or affect the special provision in the La Crosse city charter authorizing the common council to appropriate from the general fund a sum not exceeding $2,000 annually for the support of the La Crosse Public Library,—the two provisions having manifestly been enacted for different purposes, and the exercise of one power not preventing the exercise of the other.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Reversed.*

The Trustees of The La Crosse Public Library petitioned the circuit court for a peremptory writ of *mandamus* to compel the defendants to pay over to the petitioners the sum of $6,000 which had been levied and collected as a special library tax and by resolution of the common council of the city appropriated to the petitioners as trustees of the library.

The petition states the following facts: "The La Crosse Public Library" is a corporation duly incorporated under the laws of the state of Wisconsin; it was incorporated for the purpose of establishing and maintaining a public library for the benefit and free use of the people of the city of La Crosse; it maintains and operates such a library in a building equipped for that purpose pursuant to the will of C. C. Washburn; the original endowment fund of $50,000 given by the will of C. C. Washburn has been increased by other donations so that the annual income from such fund amounts to $3,000, all of which is devoted to the maintenance of this library in the city of La Crosse; the will of C. C. Washburn provides for the creation of a corporation for the administration of the funds given by the will and received from other donors under the management of a board of seven directors of such corporation, of which the mayor of the city of La Crosse is to be *ex officio* a member; such directors are to serve without compensation; the will named and appointed, in addition to the mayor of the city, six citizens of the city of La Crosse as trustees and provided that the trustees are to appoint their successors; since the year 1888 the city of La Crosse has appropriated some money every year for the maintenance of the library, and since the year 1903 the officers of the city have levied a special library tax of more than $2,000 annually and have paid the same to the petitioners for the support of this library; in November, 1915, the common council of the city of La Crosse, by resolution, provided that

a tax of $6,000 be levied and collected for the purpose of aiding and maintaining "The La Crosse Public Library" and such sum has been collected and kept separate from the other moneys of the city and is now in the city treasury; on the 10th day of March, 1916, the common council duly resolved that the sum of $6,000 be set aside and appropriated to "The La Crosse Public Library" from the library fund; demand has been made upon the defendants by petitioners for the payment of this fund as directed by the common council and each of the defendants refuses to comply with the resolution. The petitioners pray that a peremptory writ of *mandamus* issue commanding these defendants to issue an order on the city treasurer for the sum of $6,000, payable to *The Trustees of The La Crosse Public Library,* properly signed and countersigned, and that the city treasurer be commanded to pay the money pursuant to such order, and for such other judgment or relief as may be just.

The circuit court dismissed the petition upon its merits without costs to either party. From such judgment this appeal is taken.

For the appellant there was a brief by *Baldwin & Bosshard,* attorneys, and the *Attorney General,* of counsel, and oral argument by *Mr. C. L. Baldwin* and by the *Attorney General* as *amicus curiæ.*

For the respondents there was a brief by *Jesse E. Higbee,* city attorney, and *Warren B. Foster,* assistant city attorney, and oral argument by *Mr. Higbee.*

SIEBECKER, J. The record shows that the defendants, as city officers, entertain a friendly attitude for the success of "The La Crosse Public Library," but refuse to take the necessary steps to pay the $6,000 involved in this litigation to the trustees of the library on the ground that the levy and collection of this sum as a library fund tax and its appropriation by the common council of the city to support "The La

Crosse Public Library" is without authority in law, and hence the action of the common council in raising this fund and so appropriating it is invalid and confers no right on the defendants to pay the money to petitioners as directed by the common council. This defense presents the question, Is the common council of the city authorized in law to levy and collect this tax and to appropriate the amount thereof for the maintenance of "The La Crosse Public Library"? The facts of the case show that the library managed by this corporation is as free and public in its functions and services to the people of the city of La Crosse as a library established pursuant to the provisions of secs. 931 to 936*a*, Stats. 1915. The bequest of C. C. Washburn indicates that he intended to endow and establish in perpetuity a library in the city of La Crosse to be administered by its citizens for the free use and benefit of the people of the city. It is manifest that this library in its objects and uses is in fact serving the purposes of such a library as is contemplated by the provisions of the statutes above cited and which declare that it is the public policy of this state that the equipment and maintenance of such libraries, as therein described, serve a useful public purpose by promoting the general educational interests of the people. The legislature obviously regards free public libraries as appropriate agencies to carry out such public purpose and hence granted to municipalities and towns the authority to levy special taxes for their support. The power of taxation cannot be conferred on these subordinate state agencies for any other than a public purpose. This has been declared in many cases. In *Att'y Gen. v. Eau Claire,* 37 Wis. 400, this court states: "In legislative grants of the power to municipal corporations the public use must appear. . . . The legislature can delegate the power to tax to municipal corporations for public purposes only; and the validity of the delegation rests on the public purpose." *State ex rel. Garrett v. Froehlich,* 118 Wis. 129, 94 N. W. 50; *Brodhead v.*

Milwaukee, 19 Wis. 624; *State ex rel. New Richmond v. Davidson,* 114 Wis. 563, 88 N. W. 596, 90 N. W. 1067. Since the purpose is public it is within the provisions of sec. 3, art. XI, of the state constitution.

It is urged that the provisions of the statute conferring power on municipalities and towns to raise money by taxation for establishing and maintaining libraries limited the use of such power to raise money only for the support of libraries that are established under the provisions of these statutes. The statutes in terms authorize the raising of library funds by taxation for the support and maintenance of any established secular and nonsectarian public library and reading room free to the inhabitants of a city, to be expended under the authority of its board of education. This indicates most directly that the legislative purpose in delegating this authority to raise money by taxation is not restricted to the support of libraries established pursuant to these statutes. The provisions of the law contain no restrictive terms indicating a purpose to limit this public support to any specific class of libraries and no sufficient reasons are apparent why the power should not be exerted by the proper authorities in support of free libraries that serve the whole public, as do those established by cities under the law. As shown by the instant case, "The La Crosse Public Library" renders all the service to the people of La Crosse that any library established by the city under the statutes could render, and the only point wherein the administration of its corporate affairs differs from one established by the city is that six of its seven trustees are selected by the corporate trustees instead of the common council, and the city mayor is *ex officio* made the seventh member. True, the expenditure of the money raised and the report thereof to the common council is not controlled by the statutory regulations which apply to trustees of libraries established by cities. However, the trustees of this library are in law required to devote the funds, furnished them by the city for its support, in all re-

spects as providently and appropriately for the benefit of all the people of the city as if they were selected by the common council. Should any delinquency occur in the faithful discharge of their public duties they would in equity be responsible for such defaults in the same measure as are the trustees of libraries established by cities. It is also obvious, should any occasion arise for complaint in any respect, that the people of the city would undoubtedly enforce their right of refusal to grant further support thereafter. We find no force in the argument that the levy, collection, and appropriation of the library funds raised by taxation in La Crosse by the common council to support this public library is an invalid exercise of the taxing power because the corporation that administers its affairs is a private corporation and controlled by a board of trustees who, except the city mayor, are privately appointed.

"The test to be applied in determining whether a particular agency may be employed by the state or some particular subdivision thereof by legislative authorization, to perform any particular work, is not whether the agency is public, *but whether the purpose is public within the legitimate functions of our constitutional government.* If the purpose be public and constitutional, and the agency be an appropriate means to accomplish it, and not expressly or by necessary implication prohibited by state or national constitution, its employment, under reasonable regulations for control and accountability to secure public interests, is legitimate and constitutional. . . . As indicated in *Curtis's Adm'r v. Whipple,* 24 Wis. 350, it is not sufficient that an enterprise be one in which the public are interested and which might be conducted at public expense, to warrant the using of the taxing power to aid it *ex donatio;* but it may be used for the purpose of compensating for an equivalent in public service rendered under proper regulations to protect municipal interests, unless the particular governmental function to which it relates is expressly or by necessary implication restricted to public agencies." *Wis. Ind. School v. Clark Co.* 103 Wis. 651, 667, 79 N. W. 422.

The city of La Crosse operates under a special charter. In 1889 the city charter was amended to read as follows: "The common council shall have power to appropriate and to pay out of the general fund for the support of the La Crosse Public Library such sums of money, not exceeding two thousand dollars per year, as it may deem expedient." This conferred a special authority on the common council to appropriate moneys for this purpose to a limited amount. The power conferred by sec. 931, Stats. 1915, is to levy a tax upon the taxable property of the city to provide a library fund. The purposes to which this fund may be applied we have already considered. It is obvious that it contemplates support of a public library different in nature and broader in scope than the special charter provision above quoted. Conflicts in statutes are to be avoided if that can be reasonably done. Furthermore, a general statute is not to be construed as amending a special charter if the two acts do not of necessity conflict in their operation. By sec. 4986, Stats. 1915, it is also declared that a variance between a general law and charter provision shall not abolish the special charter provision when a different intention be plainly manifest. The authority to provide a library fund as provided in sec. 931, Stats. 1915, and the special provision of the La Crosse city charter were manifestly enacted for different purposes and the exercise of one of these powers does not prevent the exercise of the other. Under such conditions it must be held that the general law does not affect the special charter provision and both can stand as enacted.

The result of the foregoing considerations is that the petitioners are legally entitled to have the $6,000, raised as a library tax by the city, paid to them pursuant to the resolution of the common council.

By the Court.—The judgment appealed from is reversed, and the cause remanded to the circuit court with direction to grant the writ as prayed in the petition.

STATE, Appellant, vs. HELMANN and another, Respondents.

May 27—June 13, 1916.

Intoxicating liquors: License bond: Action for breach: District attorney: Condition precedent: Judgment for full penalty: Statutes: Construction.

1. Under sub. 1, sec. 752, Stats. 1915, the district attorney has authority to prosecute an action to recover the penalty on a liquor license bond for breach thereof, the state being interested.
2. The rule that a penal statute should be strictly construed does not mean that it should be so construed for the purpose of minimizing its effect, but that it should be so construed to effect the legislative intent—that being the sole office of judicial construction.
3. An unsatisfied judgment collectible out of a liquor license bond given under sec. 1549, Stats., is not a condition precedent to the maintenance by the state of an action for breach of such bond.
4. For breach of a liquor license bond, judgment, in an action by the state, should go for the full penalty of $500, that being treated as liquidated damages; and the court may then apply the proceeds primarily towards the satisfaction of existing judgment indebtedness, if any, as in said section provided.

APPEAL from a judgment of the circuit court for Columbia county: CHESTER A. FOWLER, Circuit Judge. *Reversed.*

Action prosecuted by the district attorney to recover the penalty on a liquor license bond for breach thereof in selling intoxicating drinks to persons who were intoxicated or bordering thereon.

The bond was given under sec. 1549, Stats., which requires every person, as a condition of receiving a license to keep a place for the sale of intoxicating liquor, to deliver to the clerk of the issuing municipality a bond in the sum of $500

"conditioned that the applicant, during the continuance of his license, will keep and maintain an orderly and well regulated house; that he will permit no gambling with cards, dice or any device or implement for that purpose within his prem-

ises or any outhouse, yard or shed appertaining thereto; that he will not sell or give away any intoxicating liquor to any minor, having good reason to believe him to be such, or to persons intoxicated or bordering upon intoxication or to habitual drunkards; and that he will pay all damages that may be recovered by any person pursuant to section 1560, and that he will observe and obey all orders of such supervisors, trustees or aldermen, or any of them, made pursuant to law. In case of the breach of the condition of any such bond an action may be brought thereon in the name of the state of Wisconsin, and judgment shall be entered against the principals and sureties therein named for the full penalty thereof; and execution may issue thereupon by order of the court therefor to satisfy any judgment that may have been recovered against the principal named in said bond by reason of any breach in the conditions thereof or for any penalties or forfeitures incurred under this chapter. If more than one judgment shall have been recovered the court, in its discretion, may apply the proceeds of said bond towards the satisfaction of said several judgments in whole or in part in such manner as it may see fit."

There was no claim of any conviction of the principal in the bond having occurred, or any judgment having been rendered against him for the recovery of a fine or costs or damages. In due course, the jury found that he had sold intoxicating drink on two occasions as charged. Judgment was rendered against the plaintiff, notwithstanding the verdict, upon the ground that no action will lie upon such a bond in advance of there being some judgment for a recovery of money to be collected therefrom and the same being unsatisfied.

For the appellant there was a brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Mr. Messerschmidt.*

J. L. Mahoney, for the respondent *Helmann,* and *William O. Kelm,* for the respondent *Fidelity & Deposit Company of Maryland.*

MARSHALL, J. It is contended, on behalf of respondents, that the district attorney had no authority to commence or prosecute the action. He had such authority, under sub. (1), sec. 752, Stats., if the state was interested, and we think it was, as will be seen by what follows.

It was the opinion of the trial court that statutes and decisions elsewhere do not materially aid in determining whether an unsatisfied judgment of some sort, collectible cut of a liquor license bond, must exist as a condition precedent to an action thereon and with that we may well agree. It is well illustrated by the decisions cited by counsel for respondents in support of the judgment.

In *State v. Estabrook,* 29 Kan. 739, the court dealt with a druggist bond. It could only be breached by some violation of law which would subject the violator to a prosecution and judgment for a money recovery and the statute did not provide for a judgment for the full penalty of the bond in case of any breach thereof.

In *Squires v. Miller,* 173 Mich. 304, 138 N. W. 1062, the court had to do with a bond given to secure payment of civil damages under a statute creating liability therefor. The amount of the bond was not small and applicable to all cases as here, but was fixed by the common council with reference to being adequate security for payment of any judgment which might be rendered under the civil damage act. In the particular case, the penal sum was $3,000. The case went upon the ground that it was based on the wrong and not on the bond.

In *State v. Larson,* 83 Minn. 124, 86 N. W. 3, the statute was different in several material features from ours. The penalty in the bond required by the statute was $2,000, and the amount inclined the court to the view that the legislature did not intend it to be considered as liquidated damages; but, most significant of all, the statute did not expressly pro-

vide, as ours does, that in case of any breach of the bond, an action might be maintained thereon and judgment be rendered "for the full penalty." The absence of such a provision from the statute seems to have been the deciding circumstance. It is quite probable that but for such absence the result would have been different. After reasoning that the large penalty rendered the statute open to construction and pointing to a mere purpose of making the bond security for payment of money recoveries, the court said, in regard to the contrary view: "We cannot believe that the legislature intended any such drastic measure; for, had that been the design, the law would have so stated. This has been done in some states; it being expressly provided in some that *judgment may be entered on such a bond against the principal and sureties for the full penalty thereof.*" That seems to indicate, pretty plainly, that had such feature characterized the statute, the result would have been different, notwithstanding the drastic character of the penalty. It should be noted that the decision was by a divided court. An able dissenting opinion was filed, pointing out that, in all the authorities, a distinction is made between the bonds given to the state, conditioned for an observance of law, and other bonds, and that, as to the former, the designation "of a specific sum as a penalty has the effect of constituting a bond given in compliance" with the statute "a covenant for liquidated damages, or a penalty imposed by the sovereign power . . . unless a different intent appears." 4 Am. & Eng. Ency. of Law (2d ed.) 700.

The foregoing shows that authorities referred to by counsel for respondents furnish little or no support for the decision appealed from. Doubtless the trial court so viewed the matter in discarding them, as appears to have been the case, and pinning the result to the words of the statute, itself, in the light of rules for construction.

Much stress seems to have been put upon the fact that our

statute has been in existence for many years and there is no record of its having been regarded as permitting such a judgment as is contended for in behalf of appellant. That circumstance does not seem to be entitled to much weight, since there is no record to the contrary. The court is not embarrassed by any precedent or practical construction, as to giving effect to the statute according to what appears to have been the legislative intent.

As before indicated, the trial court viewed the statute as ambiguous and proceeded to construe it. In doing so, the principle was applied, which is right in its place, though not always rightly used, that a penal statute should be strictly construed. That does not mean that such a statute should be so construed for the purpose of minimizing its effect; but be so construed to effect the legislative intent. The sole office of judicial construction of a statute is to give efficiency to the purpose of the lawmaking power. Where such purpose is clear, the legislative language should be strictly or liberally construed according to the effect as regards such purpose. Where the purpose is uncertain, the language should be read strictly to soften its severity; where otherwise, it would express a meaning which would be unreasonably harsh. The idea that a penal statute, or statutes in derogation of the common law, should, generally, be strictly construed in favor of minimizing the disturbance of the situation existing at the time of its origin, has a tendency to defeat legislative efforts to remedy existing harmful conditions and to prevent recurrence of them. It may be that the very opposite of strict construction should be applied, where construction is needed. The purpose of the statute is the best guide to go by since all rules for construction are intended to give vitality to such purpose. Its language being plain, whether the legislative policy is good or bad, or whether the statute seems rather harsh, is no concern of the court, where the circumstances in that regard are not such as, of them-

selves, or in connection with others, to render the legislative language ambiguous. *Koepp v. Nat. E. & S. Co.* 151 Wis. 302, 139 N. W. 179.

Reading the language of the statute in the light of the whole scope of the condition of the bond and the purpose indicated, it seems plain. As we have said, the required condition of the bond covers many transgressions, which experience evidently showed at the time of the enactment of the statute, were liable to occur and should be guarded against by a general penalty. Many were not provided for in any other way. To the condition as a whole, the language was directed "In case of the breach of the condition of any such bond an action may be brought thereon in the name of the state of Wisconsin, and judgment shall be entered against principals and sureties therein named for the full penalty thereof."

Looking to the effects and consequences of administering the statute according to its plain ordinary sense, no absurd or unreasonable result would occur which suggests ambiguity. The penalty is not shockingly large, as in *State v. Larson,* 83 Minn. 124, 86 N. W. 3, which so efficiently, as we have seen, influenced the Minnesota court. The penalty is so small, in connection with the fact that it applies to all cases, as to rebut the idea that it was intended solely as security for payment of judgments for the recovery of money. On the other hand, if full effect were not given to the statute, there would be the absurd result of many features of the condition of the bond being wholly without remedy. That situation in *Coggeshall v. Pollitt,* 15 R. I. 168, 1 Atl. 413, was regarded as a conclusive indication of legislative intention that the penalty should be treated as liquidated damages for violation of law.

There are many authorities in line with *Coggeshall v. Pollitt, supra,* some of which are cited to our attention by counsel for appellant. *Lyman v. Schenck,* 37 App. Div. 234, 55 N. Y. Supp. 770; *Lightner v. Comm.* 31 Pa. St.

341; *Tripp v. Norton,* 10 R. I. 125; *State ex rel. Canyon Co. v. Forch,* 26 Idaho, 755, 146 Pac. 110; *Granger v. Hayden,* 17 R. I. 179, 20 Atl. 833; *State v. Corron,* 73 N. H. 434, 62 Atl. 1044; *Paducah v. Jones,* 126 Ky. 809, 104 S. W. 971; *Cullinan v. Burkard,* 93 App. Div. 31, 86 N. Y. Supp. 1003.

In 1 Woollen & Thornton, Intox. Liq. sec. 482, this is deduced from the authorities: "If the bond provide for the recovery of a certain penalty, the amount of damages occasioned by the violation of the law has no place in the case." "The sum named in the bond, where it is the amount of recovery for any breach of its conditions, is treated as liquidated damages."

In general, in the cases cited, the penalty was moderate, being $500 or less, and the bond covered breaches for which there could be no assessment of actual damages, as in this case. In *Cullinan v. Burkard, supra,* the bond was very much like the one here, and the court remarked: "The sum named in the bond was fixed as the amount which, in certain contingencies, should be paid as damages which could not be fixed by any of those methods which commonly are applied to the determination of damages." In *Paducah v. Jones, supra,* the bond was of the same general character as here, and it was held: "If the bond is broken" the principal and surety "are liable for the sum stipulated therein." "It is not contemplated that the recovery should be for any less sum than that fixed. . . . The only legitimate subject of inquiry is whether or not the condition of the bond has been broken. If it has, the sureties by the letter of their undertaking agree that they will pay a certain sum." See, also, *Clark v. Barnard,* 108 U. S. 436, 2 Sup. Ct. 878, quoting at length page 458 from Chief Justice TANEY's opinion in *U. S. v. Montell,* Taney, 47, where it was held that the amount of the recovery on a bond given, conditioned upon the observance of law, is the amount named therein "inflicted by the sovereign power for breach of its laws."

We do not overlook the provision that "execution may issue

thereupon by order of the court therefor to satisfy any judgment that may have been recovered. . . . If more than one judgment shall have been recovered the court, in its discretion, may apply the proceeds of said bond towards the satisfaction of said several judgments in whole or in part in such manner as it may see fit." That does not seem to cast any serious doubt on whether the language preceding it, provides for a recovery upon the bond of the full penalty, upon a successful prosecution for any breach of it.

It will be observed that no room is left by the statute for collection of any judgment, by enforcing the judgment upon the bond, not existing at the time of rendition of the latter. The entire proceeds of the bond liability are then available for any proper use. The bond is wholly merged in the judgment on it.

We reach the conclusion that the legislative purpose was as expressly stated, that judgment in a case of this sort, where a breach is found, shall go for "the full penalty thereof;" that being treated as liquidated damages; but that the court may apply the proceeds, primarily, to the satisfaction of existing judgment indebtedness. This, we think, is not only the plain meaning of the bond, but is supported by authorities in general.

By the Court.—The judgment is reversed, and the cause remanded with directions to render judgment in accordance with this opinion.

MECHANICAL APPLIANCE COMPANY, Appellant, vs. A. KIECKHEFER ELEVATOR COMPANY, Respondent.

June 13, 1916.

Appealable orders.

An order of the circuit court reversing a judgment of the civil court of Milwaukee county and ordering a new trial in the circuit court "grants a new trial" and hence is appealable under sub. (3), sec. 3069, Stats. 1915. The proviso in said sub. (3) that no order shall be considered appealable which simply reverses or affirms "an *order* of the civil court," is not applicable.

APPEAL from an order of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Motion to dismiss denied.*

The respondent moved to dismiss the appeal.

For the respondent, in support of the motion, there was a brief by *Doe, Ballhorn & Doe,* and oral argument by *Harold M. Wilkie.*

For the appellant there was a brief by *Robert R. Freeman,* and oral argument by *Timothy Brown.*

PER CURIAM. In this action, commenced in the Milwaukee county civil court, judgment was rendered in that court for the plaintiff, and the defendant appealed therefrom to the circuit court, where the judgment was reversed and a new trial ordered. The plaintiff has appealed to this court from this order, and the respondent now moves to dismiss the appeal on the ground that the order is not appealable.

The motion must be denied. It was held in *Pabst B. Co. v. Milwaukee L. Co.* 156 Wis. 615, 146 N. W. 879, that an order of the circuit court reversing a judgment of the civil court and ordering a retrial of the case in the circuit court "grants a new trial" and hence is appealable under the express language of sub. (3), sec. 3069, Stats., enumerating

certain classes of appealable orders. That decision covers this case unless there has been a material change in the statute, and really that is the question to be determined on this motion. By ch. 219 of the Laws of 1915 a clause was added to the subdivision cited providing (with some exceptions not material here) that an order which simply reverses or affirms an order of the civil court should not be considered appealable. It seems clear that this proviso does not apply to this case. The word "order" is used in all parts of the section technically and intentionally as meaning a direction of the court not included in a judgment. The order which is appealed from here did not simply reverse or affirm an "order" of the civil court, but reversed a "judgment" of the civil court and ordered a new trial. The court cannot extend the proviso to cover cases which its plain language does not reach.

The final sentence of the opinion in the case of *Witt v. Voigt,* 162 Wis. 568, 156 N. W. 954, is construed as an intimation that the proviso in question applies to a case like the present. The point was not before the court, however, in that case, and we are satisfied that the proviso does not apply.

By the Court.—Motion denied, without costs.

TOWN OF GRAND CHUTE, Respondent, vs. HERRICK and others, Appellants.

SAME, Appellant, vs. SAME, Respondents.

May 4—June 13, 1916.

Highways: Powers of town board: Irregular exercise: Moneys expended under void statute: Contributed moneys: Recovery from members of board.

1. Independent of ch. 337, Laws 1911 (secs. 1317*m*—1 to 1317*m*—15, Stats. 1911), a town board had power under secs. 1223, 1232, Stats., to expend money of the town upon its highways.
2. Where, prior to the decision (*State ex rel. Carey v. Ballard,* 158 Wis. 251) holding invalid a part of ch. 337, Laws 1911, a town

board, acting in good faith under that statute, turned over to the county treasurer a certain sum belonging to the town and an equal sum contributed by a group of freeholders, and said sums, together with moneys of the county and state, were expended pursuant to said act of 1911, under the supervision of the highway commission, upon a highway in the town, such action of the board was merely an irregular exercise of the power which it had under secs. 1223, 1232, Stats.; and the town having received full benefit of its money so expended and the electors having taken no action to restrain such expenditure, the town cannot recover such money from the members of the board.

3. Nor can the money contributed by the freeholders be recovered by the town. Such money having been voluntarily paid to the town for a special purpose and having been expended for that purpose, the contributors have no claim therefor against the town.

APPEALS from a judgment of the circuit court for Outagamie county: CHESTER A. FOWLER, Judge. *Affirmed on plaintiff's appeal; reversed on defendants' appeal.*

This action was brought by plaintiff, town of *Grand Chute,* a duly organized and existing town in Outagamie county, against the defendants *I. J. Herrick, G. L. Finkle,* and *Joe Kohl,* who constituted the town board of said town of *Grand Chute,* and *A. F. Petersen,* town clerk, and *Henoch Caliebe,* town treasurer of said town, to recover $1,630 with interest from the 2d day of February, 1914, this amount being $815 expended by the town board of the plaintiff town under ch. 337, Laws 1911, upon one of the highways of said town, and also the sum of $815 which was paid into the treasury of said town by a group of freeholders of Outagamie county under said ch. 337, Laws 1911.

The case was tried by the court, and it was held that plaintiff was entitled to recover the $815 expended by the town board, but was not entitled to recover the $815 contributed by the group of freeholders of Outagamie county, and judgment was rendered accordingly, from which both parties appealed to this court.

For the plaintiff there was a brief by *Morgan & Benton,* and oral argument by *Homer H. Benton.*

For the defendants *Herrick, Finkle, Kohl,* and *Petersen,* there was a brief by *Julius P. Frank,* attorney, and *Ryan, Cary & Frank,* of counsel, and oral argument by *J. P. Frank.*

Albert H. Krugmeier, for the defendant *Caliebe.*

KERWIN, J. There is little dispute upon the facts. The court below held that the appropriation of the $815, money of the town, was unlawful and constituted an unlawful diversion of public funds by the town board; that the plaintiff was not estopped to recover because of delay in bringing suit or by not commencing action to enjoin improvement of the road or the use of the funds of the town therefor.

The improvement of the highway in question was commenced during the summer of 1913, and in September, 1913, when the work was abandoned, the sum of $3,595.30 had been expended upon this highway, which money had been advanced by Outagamie county under a resolution of the county board of said county. Of the amount advanced $1,630 was the share of the state of Wisconsin under the provisions of ch. 337, Laws 1911, and $1,630 the share of Outagamie county, and the balance, $335.30, was a portion of the town's share, also advanced by the county.

The whole amount expended on the improvement of the highway in question was $5,098.67, of which amount the taxpayers of the plaintiff town contributed $815. At the town meeting April 5, 1914, a resolution was adopted by the electors authorizing the newly elected town officers to commence action to recover the $815. No part of this money was actually expended until June 30, 1914, and the work was completed August 4th thereafter and the present action commenced October 24, 1914.

It appears from the record that at the time of the annual meeting in April, 1913, there was on hand in the road and bridge fund of the plaintiff $1,611.31, and thereafter and up to March, 1914, additions were made to this fund which raised the total to $3,458.96, and during that time orders

were issued against said fund amounting to $3,392.61, which included the two orders of $815 each involved in this action.

It is true that no money had been raised by the town of *Grand Chute* specifically for road purposes, but a tax levy of six mills for the year 1913 for general town purposes included road work in said town, and the money appropriated by the defendants was from this source, except the $815 contributed by freeholders.

We shall first consider the defendants' appeal. The main question turns on whether there was a want of power on the part of the town board or an irregular exercise of power in the expenditure of the $815 town money. It may be that if there was a lack of power on the part of the defendant to act at all in the matter, under the doctrine of *Chippewa B. Co. v. Durand,* 122 Wis. 85, 99 N. W. 603; *Milwaukee v. Binner,* 158 Wis. 529, 149 N. W. 211; *Wilcox v. Porth,* 154 Wis. 422, 143 N. W. 165; *Land, L. & L. Co. v. McIntyre,* 100 Wis. 245, 75 N. W. 964, and similar cases, the judgment below against the defendants should be sustained.

The question here, however, is not one of lack of power, but one of irregular exercise of power. Nor can there be any doubt about the good faith of the defendants in expending the money as they did. They were acting under a law which they believed, and had a right to believe, was valid. They were expending money for highway purposes, which they had a right to do under provisions other than ch. 337, Laws 1911.

True, they were attempting to act under the 1911 law, the so-called force clause of which has been declared unconstitutional by this court (*State ex rel. Carey v. Ballard,* 158 Wis. 251, 148 N. W. 1090), and in pursuance thereof the $815 was paid over to the treasurer of Outagamie county and the money expended under the supervision of the highway commission and in accordance with plans and specifications previously prepared.

Our statute, sec. 1232, makes it the duty of the superin-

tendent of highways to repair and keep in good order highways within the town, etc. There can be no doubt but the matter is under the supervision of the town board and it may exercise a discretion in regard to how and by whom the work shall be done. Even in its action in turning the money over to the county and allowing the work to be done in the manner in which it was done, the failure of the board to strictly follow the statute was merely an irregular exercise, not a want, of power. It had the power to spend the money on the highway independent of the law of 1911, and, while it may have exercised such power irregularly, the town received the benefit of the money expended in the execution of a duty imposed upon the defendants as officers of the plaintiff town. The town board is charged with the care and supervision of the highways of the town. Secs. 1223, 1232, Stats.; *Remington v. Ward,* 78 Wis. 539, 47 N. W. 659.

In the instant case the plaintiff not only received the benefit of the money of the town expended upon the highway in question, but also of a large amount of money belonging to the state and county, which was also expended upon this highway. It appearing, therefore, that the money was in good faith expended by the defendants for highway purposes and the town board having the right to expend it independently of the 1911 law, and the plaintiff having received full benefit of such money so expended and the electors having taken no action to restrain such expenditure, the town cannot maintain this action to recover the same. *Thomson v. Elton,* 109 Wis. 589, 85 N. W. 425; *Frederick v. Douglas Co.* 96 Wis. 411, 71 N. W. 798; *Putnam v. Rubicon,* 32 Wis. 498; *Mt. Vernon v. State ex rel. Berry,* 71 Ohio St. 428, 73 N. E. 515, 2 Am. & Eng. Ann. Cas. 399 and note on p. 403.

In regard to plaintiff's appeal little need be said. We think it clear that the court below was right in holding that the $815 contributed by the group of freeholders cannot be recovered from the defendants in this action. The contribu-

tion by the freeholders was a voluntary payment. The money was expended for the purpose and in the manner for which it was paid by the freeholders, therefore they have no claim against the town for repayment. *Newburgh Sav. Bank v. Woodbury,* 173 N. Y. 55, 65 N. E. 858.

The matter is well stated by the learned trial judge in his opinion in the court below as follows:

"The $815 deposited by the freeholders did not belong to the town. It belonged to the freeholders. They paid it to the town to be used for a special purpose. It had been used for that purpose, in fact. It having been used as they petitioned and they having received what they desired and demanded, they have no cause to complain. They cannot recover the money from the town."

By the Court.—That part of the judgment appealed from by the plaintiff is affirmed, and on defendants' appeal that part of the judgment awarding the plaintiff judgment against the defendants is reversed, and the action remanded with directions to dismiss the complaint. Defendants to recover costs in this court.

O'CONNOR, Administratrix, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

May 23—June 13, 1916.

Railroads: Tree blown down across track: Derailment of train: Injury to employee: Negligence: Proximate cause: Unusual storm: Patroling track: Failure to inspect tree: Right to cut it down: Statutes: Federal Employers' Liability Act: Contributory negligence: Assumption of risk.

1. Where a large tree standing close to a railroad right of way was dangerous and liable to be blown down across the track by a wind storm such as was likely to occur and ought reasonably to be anticipated by the railway company, the fact that the wind which blew it down was an extraordinary and unusual one does

not affect the liability of the company for an injury caused by its falling across the track and derailing a train.

2. A finding by the jury in such case that the railway company was negligent in failing to patrol the track before the accident is *held* to be sustained by evidence that its sectionmen were located about two and one-half miles away, were under orders to patrol night and day during storms of wind or rain, and were equipped with a handcar and a gasoline car which had a speed of twenty miles or more per hour, and that the storm had been raging for half an hour and more before the accident.
3. The evidence, including the testimony of at least one witness, who was in a position to know, that the tree was dangerous and so regarded, is *held* to sustain a finding by the jury that the railway company was negligent in failing to inspect the tree and its condition.
4. Sub. (4), sec. 1828, Stats.,—giving to railway companies power to "cut down any standing trees that may be in danger of falling on the road,"—is not superseded by the federal Employers' Liability Act, but is more in the nature of an amendment to the charters of such companies.
5. Even if the federal Employers' Liability Act superseded said sub. (4), sec. 1828, a railway company would still be bound to remove a tree standing so close to its right of way that there was danger of its falling upon the track, or to guard against such danger.
6. Findings by the jury to the effect that an engineer who was killed when his train was derailed by a tree which had been blown down across the track was not guilty of contributory negligence and that there was no assumption of the risk, are *held* to be sustained by the evidence.

APPEAL from a judgment of the circuit court for Brown county: HENRY GRAASS, Circuit Judge. *Affirmed.*

This action was brought by plaintiff to recover damages on account of the death of her husband, Frank J. O'Connor, who was killed in an accident while in the employ of the defendant on the 26th day of July, 1913. At the time of the accident the defendant was engaged in interstate commerce.

The plaintiff in her complaint claimed the right to recover $40,000 damages which she sustained on account of the death of her husband through the negligence of the defendant. The defendant denied all liability and denied that the

death of said deceased was caused by the negligence of the defendant, and alleges that at the time of the accident it was engaged in interstate commerce and that deceased was in its employ as its servant. The following verdict was returned:

"(1) Did the falling of a tree across the track of the defendant cause the derailment of defendant's train and the death of Frank J. O'Connor on July 26, 1913? *A.* (by consent of counsel, answered by the court). Yes.

"(2) Did any part of the body or trunk of said tree stand upon defendant's right of way? *A.* (answered by the court). No.

"(3) Was such tree in danger of falling on the track? *A.* Yes.

"(4) If you answer the third question 'Yes,' then was the defendant negligent in failing to inspect such tree and its condition? *A.* Yes.

"(5) If you answer the fourth question 'Yes,' was such failure to inspect a proximate cause of the death of Frank J. O'Connor? *A.* Yes.

"(6) If you answer the third question 'Yes,' then was the defendant negligent in failing to apply to the court for the right to cut such tree down? *A.* Yes.

"(7) If you answer the sixth question 'Yes,' then answer this question: Was such failure to apply to the court a proximate cause of the death of Frank J. O'Connor? *A.* Yes.

"(8) Was the defendant negligent in failing to patrol the track near Pembine on the night of July 26, 1913, preceding the accident? *A.* Yes.

"(9) If you answer the eighth question 'Yes,' then answer this ninth question: Was such negligence of defendant a proximate cause of Frank J. O'Connor's death? *A.* Yes.

"(10) Did Frank J. O'Connor in his situation know or should he have known that the tree was liable to fall across the track and to cause injury or death to himself? *A.* No.

"(11) Did any failure of Frank J. O'Connor to exercise ordinary care proximately contribute to his death? *A.* No.

"(12) In what sum do you assess the plaintiff's damages? *A.* $9,000.

"(13) If you answer the eleventh question 'Yes,' then answer this thirteenth question: In what sum do you diminish

the plaintiff's damages on account of Frank J. O'Connor's failure to exercise ordinary care? *A.* ——.

"(14) Was the wind storm that blew down the tree that caused the wreck a storm of unusual and extraordinary severity in the section of country where it occurred? *A.* Yes (answered by the court).

Judgment was rendered in favor of the plaintiff upon the verdict, from which this appeal was taken.

For the appellant there was a brief signed by *C. H. Van Alstine* and *Henry J. Killilea,* attorneys, and *Greene, Fairchild, North, Parker & McGillan,* of counsel, and oral argument by *Mr. Killilea.*

For the respondent there was a brief by *Minahan & Minahan,* and oral argument by *V. I. Minahan.*

KERWIN, J. It is contended by counsel for appellant that the court below should have directed a verdict for defendant upon the following grounds: (a) because no negligence on the part of the defendant which proximately contributed to the injury was shown; (b) because the deceased was guilty of negligence which was the proximate cause of his death; and (c) because deceased assumed the risk which caused his death.

Deceased was killed in a wreck caused by a pine tree which stood on the west edge of the right of way falling across the defendant's railroad track at Cataline, about two and one-half miles south of Pembine in Marinette county, Wisconsin.

The jury found that defendant was negligent in failing to inspect the tree and that such negligence was a proximate cause of the injury; that defendant was negligent in failing to apply to the court for right to cut the tree, and that such negligence was a proximate cause of the injury; that defendant was negligent in failing to patrol the track, and that such negligence was a proximate cause of the injury; that deceased did not know the tree was liable to fall across the track, and was not guilty of contributory negligence.

The tree fell across the track during a severe wind and rain storm, and the court answered the fourteenth question that the wind storm that blew the tree down and caused the wreck was a storm of unusual and extraordinary severity in the section of the country where it occurred.

Assuming that the fourteenth question was for the court and not the jury and that it was properly answered by the court, we are of opinion that the other findings of the jury are consistent with the answer to the fourteenth question, and if supported by the evidence support the judgment.

The tree which fell across the track and caused the wreck stood on or near the line of the right of way. The wires of the fence on the west side of the right of way were attached to it. It had stood there for several years after other timber about it had been cut. It was 100 feet high and about a foot and a half in diameter at the butt.

The contention of appellant is that under the fourteenth finding the defendant was not bound to anticipate that the tree would fall on the track, hence that the falling of the tree was not the proximate cause of the injury. True, as said by this court in *Atkinson v. Goodrich T. Co.* 60 Wis. 141, 164, 18 N. W. 764, "A man is not bound to ward against a result which cannot be reasonably expected to occur, and negligence cannot be attributed to him for failing to do so." On this rule counsel for appellant argue that the answer to the fourteenth question is conclusive on the point that the storm that blew the tree down was of such unusual severity that it could not have been foreseen, hence there could be no liability.

Whether the storm which blew the tree down was of such an extraordinary character as not to have been foreseen or reasonably anticipated by defendant does not establish the nonliability of defendant. The evidence shows, and the jury found, that a storm which the defendant should have foreseen was likely to occur would have blown the tree down. There is evidence in the case that the tree was regarded dan-

gerous and that a wind of the velocity of forty miles an hour would have blown it down, and that for a period of about twenty years prior to the accident there had been in Wisconsin annually wind storms ranging from forty to sixty-eight miles per hour. If, therefore, the tree was liable to be blown down by a storm such as was likely to occur, then it is immaterial that the storm which blew it down was of unusual severity. The proximate cause was the failure to remove the tree, which was dangerous, or guard against its falling upon the track.

Even if it can be said that the failure to remove the dangerous tree was not, but that the extraordinary wind was, a proximate cause of the wreck, still the dangerous tree was a concurring cause and the defendant is liable under the established rule of law on this proposition.

Appellant relies upon *Cook v. M., St. P. & S. S. M. R. Co.* 98 Wis. 624, 74 N. W. 561, and other cases, but an examination of these cases cited by appellant will show that they are not in point here. As we have heretofore observed, if the findings are supported a case is made against the defendant.

The jury found negligence in failing to patrol the track after the storm. It is urged that this could not have avoided the wreck, because the violent storm which blew the tree down occurred only a very short time before the wreck, and that ordinary care did not require patrol during this short interval. The sectionmen at Pembine, only about two and one-half miles from Cataline, were under orders to patrol day and night during storms of wind or rain. They were equipped with a handcar and a gasoline car which had a speed of twenty miles or more per hour. There is evidence that the storm was raging for half an hour and more before the wreck, and this warranted the jury in finding that there was ample time for the sectionmen at Pembine to go down the track, discover the tree, signal the train, and thus have avoided the wreck.

The jury found that the defendant failed to inspect the tree. It is contended by appellant that inspection would not have revealed that the tree was dangerous or would have fallen from ordinary or usual storms, and that the defendant was not bound to guard against an unusual and extraordinary wind. It is further argued by appellant that an inspection would have disclosed nothing which would have warranted a conclusion that the tree was in danger of falling. We are of opinion, however, that the evidence was ample to support the findings of the jury on this question. In fact there is evidence in the record of at least one witness in position to know that the tree was dangerous and so regarded, and if the tree was dangerous and liable to fall across the track from an ordinary wind which the defendant was bound to foresee and reasonably anticipate, it is wholly immaterial whether the wind which caused the tree to fall was an extraordinary and unusual wind. *Goddard v. C., B. & Q. R. Co.* 143 Wis. 169, 174, 126 N. W. 666.

The jury found that the defendant was negligent in failing to apply to the court for right to cut the tree. It is argued by appellant on this point that our statute, sub. (4), sec. 1828, is not applicable because this statute is superseded by the federal Employers' Liability Act, and some federal cases are cited on this point, notably *Seaboard A. L. R. Co. v. Horton,* 233 U. S. 492, 34 Sup. Ct. 635. Originally in Wisconsin under our statutes the right to condemn right of way for railroad purposes 200 feet wide existed, but later this statute was amended so as to allow condemnation of 100 feet for right-of-way purposes and also reserving to railroad companies the rights given under sub. (4), sec. 1828, to "cut down any standing trees that may be in danger of falling on the road." *Wis. Cent. R. Co. v. Cornell Univ.* 49 Wis. 162, 5 N. W. 331. It seems clear, therefore, that sub. (4), sec. 1828, is not superseded by the federal Employers' Liability Act. It is more in the nature of an amendment to the de-

fendant's charter. *State v. Railway Cos.* 128 Wis. 449, 504, 108 N. W. 594; *Rice v. C., B. & Q. R. Co.* 153 Mo. App. 35, 131 S. W. 374; *Texas & St. L. R. Co. v. Vallie,* 60 Tex. 481; *Att'y Gen. v. Railroad Cos.* 35 Wis. 425; *Manitowoc v. Manitowoc & N. T. Co.* 145 Wis. 13, 129 N. W. 925. But even if it were held that the federal Employers' Liability Act superseded sub. (4), sec. 1828, Stats., still at common law the defendant would be bound to protect its employees and passengers from dangers which ordinary care and prudence could guard against, and there seems to be no doubt but that the defendant would be bound to remove the tree in question independent of statute or guard against the danger incident to its falling upon the track and injuring passengers or employees, if in fact there was danger of the tree falling upon the track.

The findings of the jury on assumption of risk and contributory negligence, we think, are well supported by the evidence. Under the evidence the jury was well warranted in finding no assumption of risk. *Dorsey v. Phillips & C. C. Co.* 42 Wis. 583; *Hemmingsen v. C. & N. W. R. Co.* 134 Wis. 412, 114 N. W. 785; *Choctaw, O. & G. R. Co. v. McDade,* 191 U. S. 64, 24 Sup. Ct. 24; *Union Pac. R. Co. v. O'Brien,* 161 U. S. 451, 16 Sup. Ct. 618.

Appellant further argues that error was committed on the trial in respect to the charge to the jury and in refusal to grant a new trial, but a careful examination of these alleged errors convinces us that no prejudicial error was committed in this regard. The whole charge was very fair to defendant. The following extracts are fair samples:

"The court charges you that the defendant in conducting its business with respect to the care of the safety of its road or track at Cataline was not required to foresee or anticipate that any such wind storm as the one in question would occur, and if the tree which fell on the track was in danger of falling only in case of the prevalence of a wind of such unusual

and extraordinary severity, you must answer the third question of the special verdict in the negative, that is, you must answer the third question 'No'." . . .

"The court instructs you the presumption is that the defendant company did inspect the tree, and the burden of proof as to this question is upon the plaintiff to satisfy you to a reasonable certainty by a preponderance of evidence that this question should be answered 'Yes;' but if you are not so satisfied your answer must be 'No'." . . .

"You are also directed, in considering your answer to this fifth question, that if you find that the tree would fall only from a wind of unusual and extraordinary severity as prevailed when the tree fell, and caused it to fall, then your answer to the fifth question of the special verdict must be 'No'." . . .

The learned trial judge favored us with a written opinion which is a part of the record and which reviews the whole case very fully, and we think the conclusions arrived at are correct. We are of opinion that the case was fairly tried in the court below and no prejudicial error committed.

By the Court.—The judgment is affirmed.

NORTHERN CHIEF IRON COMPANY, Respondent, vs. TOWN OF VAUGHN and another, Appellants.

May 24—June 21, 1916.

Gertz v. Vaughn, ante, p. 557, followed.

APPEAL from a judgment of the circuit court for Iron county: G. N. RISJORD, Circuit Judge. *Affirmed.*

The briefs in the case of *Gertz v. Vaughn, ante,* p. 557, were by stipulation used in this case, and there were additional briefs on the question of estoppel:

A. L. Ruggles, attorney, and *Wm. F. Shea,* of counsel, for the appellants.

For the respondent there was a brief by *Lamoreux & Cate,* and oral argument by *Geo. C. Foster* and *C. A. Lamoreux.*

ROSENBERRY, J. The issues in this case are the same as those in *Gertz v. Vaughn, ante,* p. 557, 158 N. W. 298, and this case is controlled by the decision in that case, and the mandate will therefore be the same.

By the Court.—Judgment affirmed.

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1. A letter written by one C., after marriage with plaintiff's mother, to a boarding-house keeper with whom plaintiff, then ten years old, was boarding, stating that the mother would shortly call for him to bring him to C.'s home and that C. would adopt him as his own son, was no more than a declaration of an intention to adopt the plaintiff; and the facts that plaintiff's mother afterwards brought him to their home, that he was received and treated by C. as a son, and that he lived there until he attained his majority, do not establish a contract of adoption, in the absence of any direct proof that such a contract was in fact made between C. and plaintiff's mother, who was the only person who could contract for him in the matter. *Heath v. Cuppel,* 62

2. The evidence being insufficient to establish the existence of a contract of adoption, an action to enforce specific performance of such contract was properly dismissed. *Ibid.*

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From what appeal may be taken: Orders.

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2. Findings of fact and conclusions of law in a partition action do not constitute, in substance or effect, an order or interlocutory judgment from which an appeal can be taken under sec. 3143, Stats. *Ibid.*
3. An order denying a motion to set aside a summons is not appealable. *Hammond-Chandler L. Co. v. Industrial Comm.* 596
4. An order of the circuit court reversing a judgment of the civil court of Milwaukee county and ordering a new trial in the circuit court "grants a new trial" and hence is appealable under sub. (3), sec. 3069, Stats. 1915. The proviso in said sub. (3) that no order shall be considered appealable which simply reverses or affirms "an *order* of the civil court," is not applicable. *Mechanical A. Co. v. A. Kieckhefer E. Co.* 647

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6. If, notwithstanding denial of the motion of one party defendant to set aside the summons and dismiss the proceedings, a like motion by a codefendant is granted and a judgment of dismissal is rendered, the one whose motion was denied cannot appeal from such judgment as an aggrieved party. *Ibid.*

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Dismissal of appeal. See APPEAL, 20. EXECUTORS, 4.

Review: Questions of fact: Presumptions. See BILLS AND NOTES, 5.

9. Where the trial was by the court, improper evidence received under objection will be presumed not to have been given weight unless the contrary clearly appears. *Johnson v. Bank of Wisconsin,* 369

Same: Verdicts and findings. See WILLS, 1.

10. Findings by a jury, approved by the trial court, will not be set aside on appeal if supported by any believable evidence,—that is, unless the evidence is contrary to all reasonable probabilities; and so long as there is a state of evidence requiring conflicting probabilities to be considered, a jury determination either way cannot be said to be against all reasonable probabilities. *Campbell v. Germania F. Ins. Co.* 329

11. Inferences of fact drawn from the evidence by the trial court will not be disturbed unless clearly wrong. *Ripon H. Co. v. Haas,* 592

12. A letter sent to counsel by the trial judge, in transmitting a copy of his decision, in which the court remarked that it was apparent that one plaintiff "was lying whenever he saw a chance to lie," is not, if proper to be considered at all, a sufficient basis for denying equitable relief to plaintiffs on the ground that they testified falsely, where the findings of fact subsequently made and twice reviewed by the court contained no reference to the matter. *Miranovitz v. Gee,* 246

Affirmance and reversal: Material and immaterial errors. See AUTOMOBILES, 4. BOUNDARIES, 4. BRIDGES, 3. CRIMINAL LAW, 6–9. LIBEL, 4, 5. MASTER AND SERVANT, 16. WITNESSES, 2.

13. This court will not reverse a judgment because of the rejection of evidence, unless its materiality clearly appears and it likewise appears that the exclusion might have affected the result unfavorably to the party complaining. *Campbell v. Germania F. Ins. Co.* 329

14. Error in refusing to give requested instructions which were appropriate and would have aided the jury will not work a reversal unless it appears that had they been given the result would probably have been more favorable to the party requesting them. *Schumann v. Kaukauna,* 396

15. Permitting a claimant to testify as to personal services rendered by her to a decedent, upon which her claim against his estate is based, will not be held error where no proper objection was seasonably made. *Gardner v. Young's Estate,* 241

16. Errors committed in the course of the trial are not sufficient ground for reversing a judgment unless it pretty clearly appears that the result might probably have been more favorable to the party complaining if they had not occurred; and, in the light of the presumption that the trial was before a competent judge and an impartial and intelligent jury, there is generally little use in bringing to the attention of this court many detail matters in respect to the admission of evidence, where such matters must be considered in connection with a mass of evidence and many circumstances. *Union Bank v. Commercial S. Co.* 470

Affirmance by divided court.

17. A judgment of the circuit court reversing an award made by the industrial commission is affirmed, this court being equally divided on the question whether there was sufficient evidence before the commission to give it jurisdiction. *Wisconsin Chair Co. v. Industrial Comm.* 25

18. Upon an appeal from a judgment for the amount found due on a railway construction contract, the justices participating in the decision being equally divided as to the conclusiveness of the final estimate of defendant's chief engineer and upon the question of affirmance of the whole judgment, the judgment is affirmed. *Nelson v. Fairchild & N. E. R. Co.* 300

19. A judgment of the circuit court affirming an award made by the industrial commission is affirmed on appeal, this court being equally divided. *Faust L. Co. v. Industrial Comm.* 365

Determination and disposition of cause. See EXECUTORS, 4. INJUNCTION, 3. LIBEL AND SLANDER, 5. REPLEVIN, 5. VENDOR AND PURCHASER, 8.

20. Where a party to an action, who is not aggrieved by the judgment rendered therein, appeals therefrom, the appeal should be dismissed. *Hammond-Chandler L. Co. v. Industrial Comm.* 596

21. In an action based on alleged wrongful discharge of an employee, the issue having been fully litigated and the testimony being all before this court, which holds that on the admitted facts the discharge was lawful, no new trial is necessary or proper, and final judgment for the defendant is ordered. *Green v. Somers,* 96

Same: Dismissal for delay.

22. The right to have an action dismissed for failure to comply with sec. 3072, Stats., may be waived as effectually while the record remains in the supreme court as after it has been returned to the circuit court. *State ex rel. Milwaukee v. Circuit Court,* 445

23. The evidence produced upon a motion to dismiss an action because of noncompliance with sec. 3072, Stats., showing negotiations and agreements between the attorneys for the respective parties, is *held* sufficient to warrant the trial court's decision that defendant waived the right to dismissal on that ground. *Ibid.*

Costs for printing brief. See COSTS.

Allowances to guardians ad litem. See INFANTS.

Appeal from Milwaukee civil court. See APPEAL, 4.

24. The circuit court may allow motion costs not exceeding $10 on an appeal from the civil court of Milwaukee county. *Concrete Steel Co. v. Illinois Surety Co.* 41

Appeal from town supervisors. See HIGHWAYS, 1, 2.

APPEALABLE ORDERS. See APPEAL, 2–4.

APPEARANCE. See HIGHWAYS, 2.

APPOINTMENT.
Of county officers. See COUNTIES, 3.
Under power: Inheritance tax. See TAXATION, 33–36.

APPROPRIATIONS. See NORMAL SCHOOLS. STATUTES, 5–8. TAXATION, 15.

ASSAULT with intent to rape. See RAPE.

ASSESSMENT AND COLLECTION OF TAXES. See STATUTES, 1. TAXATION, 17.

ASSESSMENTS for street improvements. See ESTOPPEL, 2.

ASSIGNMENTS.

Of cause of action. See MUNICIPAL CORPORATIONS, 10–12. WORKMEN'S COMPENSATION, 11.

A person may assign a cause of action owned by him and by the terms of the assignment retain control of the litigation. *Saudek v. Milwaukee E. R. & L. Co.* 109

ASSUMPTION OF MORTGAGE. See MORTGAGES, 1.

ASSUMPTION OF RISK. See MASTER AND SERVANT, 17, 19, 20.

ASYLUMS. See HOSPITALS.

ATTORNEY AND CLIENT. See JUDGMENT, 2, 3. MUNICIPAL CORPORATIONS, 12. PHYSICIANS AND SURGEONS, 1, 2.

ATTORNEYS' FEES. See WILLS, 2.

AUTOMOBILES.

See EVIDENCE, 1, 8. NEGLIGENCE, 5. RAILROADS, 15, 16. STREET RAILWAYS, 2.

1. The "general and usual rules of the road" which, by sec. 1636—49, Stats. 1911, the driver of an automobile was required to observe, did not absolutely preclude him from seasonably invading his left-hand side of the traveled way in passing a vehicle in front of him. *Riggles v. Priest,* 199
2. Whether in this case the defendant—whose automobile, while passing another car from behind, collided with a bicycle which plaintiff was riding in the opposite direction near the center of the street—was guilty of negligence in driving upon his left-hand side of the street is *held,* under all the circumstances, to have been a question for the jury. *Ibid.*
3. For defendant to drive his automobile at a speed of more than ten miles per hour while within 150 feet of and about to pass the plaintiff was in direct violation of sec. 1636—49*a*, Stats. 1913, and was negligence as a matter of law. *Ibid.*
4. Refusal of the trial court to instruct the jury that such violation by defendant of sec. 1636—49*a*, Stats. 1913, was negligence was not in this case an error prejudicial to plaintiff, it being apparent that, even if the error had not occurred, the jury would have found, as they did, that the plaintiff was guilty of contributory negligence. *Ludke v. Burck,* 160 Wis. 440, distinguished and limited. *Ibid.*
5. The violation of a speed-limit statute, such as sec. 1636—49*a*, Stats. 1913, is not necessarily such gross negligence as renders immaterial the contributory negligence of a person injured by reason of such violation. *Ibid.*

BANKRUPTCY. See PARTIES. REPLEVIN, 3.

BANKS AND BANKING. See BILLS AND NOTES, 3–8.

BENEFICIARIES: Change. See INSURANCE, 3–7.

BILL OF EXCEPTIONS. See APPEAL, 7. EVIDENCE, 5.

BILLS AND NOTES.

Construction: Liability of parties: Indorsers.

1. In the absence of fraud, parol evidence as to what occurred between the parties before or at the time of the giving of promissory notes is not admissible to show that those whose names appear thereon as indorsers were in fact to be liable thereon as makers. *Union Bank v. Commercial S. Co.* 470

2. One who places his name on the back of a note before delivery to give credit thereto is not liable as a maker, but only as an indorser, even though he was not a party to the note prior to his so writing his name. *Ibid.*

Discharge of indorsers: Misapplication of collaterals: Estoppel: Special agreement.

3. In an action by a bank against the indorsers of promissory notes for which certain collaterals held by the bank for other notes of the same maker were secondarily security, the jury having found upon sufficient evidence that at and prior to the time of waiving protest on the notes in suit defendants promised to pay them, that after maturity of the notes in suit defendants advised and aided the transfer by the bank of said collaterals, with the notes primarily secured thereby, to another person, and that with full knowledge of such transfer they again promised to pay the notes in suit; and it being apparent from the evidence that the bank in good faith relied on such promises in parting with the collateral and in dealing with the maker of the notes, defendants are estopped from asserting they were relieved from liability as indorsers on the ground that the bank had applied the collaterals to other purposes. *Union Bank v. Commercial S. Co.* 470

4. It is not material in such case that there was no consideration moving to the indorsers for their promise to pay the notes, if such promise was made to induce the plaintiff bank to look to them and not to the collaterals or other means it might have for satisfaction of the debt in whole or in part, and the bank relied and acted thereon. *Ibid.*

5. No question having been submitted to the jury as to plaintiff's reliance upon the defendants' promises, and no request made for such submission, that question must, under sec. 2858*m*, Stats., be deemed to have been determined by the trial court in conformity with its judgment. *Ibid.*

6. The jury found that the agreement pursuant to which the said collaterals and about $20,000 of notes, given by the maker of the notes in suit and primarily secured by said collaterals, were transferred to one N., who was interested in protecting the credit of said maker, was made by N. in consideration of a promise by the bank to discount his notes, or those of companies controlled by him, to the amount of $60,000; also that such loan of $60,000 was not to become effective until approved by the directors of the bank. It appeared that such approval was to depend upon the directors being satisfied of the truth of representations made by N., which investigation proved to be untrue, but that the transaction as to the payment or purchase by N. of the $20,000 of notes and the transfer to him of the collaterals had been, in the meantime, completed and was not thereafter rescinded. *Held*, that the refusal of the bank to make the loan to N. did not affect the liability of the defendants upon their promise to pay the notes in suit. *Ibid.*

Note taken as security. See CORPORATIONS, 5.

Renewal: Repledge of collaterals: Assignment in part.

7. Findings by the trial court that a renewal note given by plaintiff's intestate to the defendant bank was delivered unconditionally; that the collateral security for the old note was repledged for payment of the new note and all other indebtedness of the maker to the bank; and that the old note was not surrendered

but was retained because the interest then due thereon was not paid or included in the renewal note, are *held* to be sustained by the evidence. *Johnson v. Bank of Wisconsin,* 369

8. At the time of the death of plaintiff's intestate the defendant bank held several of his notes, with a large amount of collateral security. Interest amounting to $1,148.01 was due on such notes. Defendant loaned $7,500 to a land company organized to take over and handle certain property of doubtful value belonging to the estate, such company agreeing, as part consideration for the loan, to pay the $1,148.01 interest due to defendant. That arrangement was specially authorized by the county court as being advantageous to the estate. Defendant thereupon assigned its claim against the estate for said interest to the land company, agreeing that the collateral should "continue, as heretofore, proportionally and *pro rata,* security for the payment of said interest . . . until the same shall be fully paid" by the estate. Thereafter the land company transferred its rights under the last-mentioned agreement to the estate. *Held,* that such transfer operated to extinguish the indebtedness for interest and to remove the incumbrance which had been placed on the collateral for the benefit of the land company, and hence that plaintiff administrator did not thereby acquire a right to any of the proceeds of the collateral until the entire indebtedness of the estate to defendant should be fully paid. *Ibid.*

BOARD OF ADMINISTRATION. See COUNTIES, 3.

BOARD OF EDUCATION. See NORMAL SCHOOLS.

BONDS.

Of building contractor: Construction: Liability of surety to laborers, etc.: Discharge of surety.

1. Where in a building contract the contractor agreed to "provide all the materials," and his bond was conditioned that he should "faithfully perform the contract on his part, and satisfy all claims and demands incurred for the same, and fully indemnify and save harmless the owner from all cost and damage which he may suffer by reason of failure so to do, and shall fully reimburse and repay the owner all outlay and expense which the owner may incur in making good any such default," third persons who furnished materials used in the construction of the building might enforce payment against the surety in an action on the bond. *Electric A. Co. v. U. S. F. & G. Co.* 110 Wis. 434, and *Yawkey-Crowley L. Co. v. De Longe,* 157 Wis. 390, distinguished. *Concrete Steel Co. v. Illinois Surety Co.* 41

2. The words "all claims and demands" in the bond include claims and demands for labor and materials, and are not limited by a specific provision in the contract that the contractor should save harmless and indemnify the owner from claims and demands which might be made by reason of any injury to person or property sustained by the contractor or by any person employed by him in connection with the work, or any such injury sustained by any person caused by any act or default of the contractor or any person employed by him, etc. *Ibid.*

3. *Concrete S. Co. v. Illinois S. Co.,* as to direct liability of the surety on the bond of a building contractor to laborers and materialmen, followed. *Milwaukee B. S. Co. v. Illinois S. Co.* 48

4. A provision in a building contract that payments shall not become due unless at the time of payment the contractor, "if so required," shall deliver to the owner a satisfactory release of all

liens, is not violated so as to discharge the surety on the contractor's bond by the making of payments by the owner without requiring such release of liens. *Ibid.*

5. Where in such case the bond contained a waiver clause providing that any alterations which might be made in the terms of the contract, or the giving by the owner of any extension of time for performance, or any other forbearance on the part of either the owner or the principal to the other, should not in any way release the principal or the surety from their liability on the bond, payments by the owner without requiring a release of liens or a statement "of all persons furnishing material or labor . . . to whom a lien is given by law," did not so violate sub. 3, sec. 3315, Stats., as to discharge the surety from liability. *Ibid.*

6. A bond issued by a surety company to secure faithful performance of a building contract is essentially an insurance contract. *Ibid.*

Same: Action on: Joinder of causes. See PLEADING, 2.

Liquor license bonds. See DISTRICT ATTORNEY. INTOXICATING LIQUORS, 6, 7.

BOUNDARIES.

See DEEDS. EJECTMENT, 1.

1. In ejectment, the question being as to the original location of a section corner, testimony of old settlers as to its location, which was corroborative of evidence of defendants' surveyor locating the line in connection with permanent monuments and visible marks or indications left on natural objects indicating the lines and boundaries of the government survey, was competent. *Nickel v. Chapman,* 348

2. Even if such evidence were incompetent, by first putting in similar evidence plaintiff opened the door for it and waived any objection to its admission. *Ibid.*

3. A plat made by defendants' surveyor, who testified that he made it and that it was correct and correctly represented the corner in dispute and other lines and points thereon, including a highway, was competent in connection with the other evidence in such case. *Ibid.*

4. The admission of testimony of the surveyor to the effect that he came to the center of a highway at forty chains, and as to what parties said about having seen witness trees at that place and pointing them out, was not in this case prejudicial error. *Ibid.*

BRIDGES.

Taxation for building. See HIGHWAYS, 9.

Defects or insufficiency: Injuries to persons or animals.

1. In an action for injury to plaintiff's horse alleged to have been caused by its catching the toe-calk on one of its shoes in a crack between the planks forming the roadway of a bridge, there being evidence that the planks were laid crosswise and that there were cracks from a quarter of an inch to more than an inch between them, the question whether such cracks constituted an insufficiency rendering the bridge not reasonably safe, and also the question whether plaintiff was guilty of a want of ordinary care in attempting to drive across it, were for the jury. *Tanner v. Rushford,* 196

2. A finding by the jury in such case that the injury to the horse, involving a fracture of the ilium and lameness, was proximately caused by the unsafe condition of the bridge is *held* to be sustained by the evidence. *Ibid.*

3. In an action for personal injuries caused by one of plaintiff's horses getting caught in the crack or opening between a drawbridge and the approach thereto, the question being whether such crack, under the existing conditions as to slope and unevenness of the floor surfaces, rendered the bridge defective and dangerous to persons driving over it, the refusal of requested instructions is *held* not to have been a prejudicial error, although the charge given was quite general. *Schumann v. Kaukauna,* 396

BRIEFS: Violation of rules: Costs for printing. See COSTS.

BROKERS. See SALES, 1.

BUILDING CODE: Restrictions. See MUNICIPAL CORPORATIONS, 4–6.

BUILDING CONTRACTS. See BONDS. CONTRACTS, 4. GARNISHMENT. PLEADING, 2.

BUILDING FUND. See NORMAL SCHOOLS.

BY-LAWS. See INSURANCE, 7.

CANCELLATION OF INSTRUMENTS. See TENANCY IN COMMON.

CARRIERS: Injury to passenger. See STREET RAILWAYS, 1.

CAUSE OF ACTION: Assignment. See ASSIGNMENTS.

CHAMPERTY AND MAINTENANCE. See MUNICIPAL CORPORATIONS, 12.

CHANGE OF GRADE: Taking of land. See RAILROADS, 1, 2.

CHATTEL MORTGAGES.

See REPLEVIN, 3–5.

Under sec. 2316*c*, Stats. 1915,—providing that whenever property covered by a chattel mortgage shall be taken and sold thereunder, the owner of the mortgage shall, within ten days after the sale, file an affidavit setting forth, among other things, "a statement in detail of the expenses of such sale, including the cost of taking and keeping the property pending the sale," and that "a copy of the notice of sale if any shall be attached to said affidavit,"—the requirements as to a *detailed* statement of expenses and as to the copy of the notice are both important, and a failure to comply therewith operates to satisfy the debt and cancel the mortgage. *Emerson-Brantingham I. Co. v. Paul,* 589

CHURCHES. See RELIGIOUS SOCIETIES.

CITIES. See MUNICIPAL CORPORATIONS.

CITY ATTORNEY. See MUNICIPAL CORPORATIONS, 10, 12.

CIVIL COURT. See APPEAL, 4, 24.

CIVIL RIGHTS. See RELIGIOUS SOCIETIES.

CLAIMS.
Against state. See COURTS. TAXATION, 25, 26.
Against counties. See HIGHWAYS, 7, 8.
Against cities. See WORKMEN'S COMPENSATION, 11.
Against incompetent persons. See GUARDIAN AND WARD.
For liens: Notice. See MECHANICS' LIENS.

CLASSIFICATION. See HIGHWAYS, 4, 5. PHYSICIANS AND SURGEONS, 5. TAXATION, 7–11, 19, 20.

CLERICAL ERRORS in assessment or tax roll. See TAXATION, 27, 28.

COLLATERAL SECURITY. See BILLS AND NOTES, 3–8.

COLLISIONS. See AUTOMOBILES. NEGLIGENCE, 5. RAILROADS, 15, 16. STREET RAILWAYS, 2–6.

COMMERCE: Interstate. See CORPORATIONS. MASTER AND SERVANT, 6. TAXATION, 2, 3.

COMPENSATION.
Of guardians *ad litem*. See INFANTS.
For injuries to employees. See WORKMEN'S COMPENSATION.

COMPLAINT. See DRAINS, 2. LIBEL AND SLANDER, 2. MASTER AND SERVANT, 16. PLEADING, 1–4. QUIETING TITLE, 1. RELIGIOUS SOCIETIES.

COMPROMISE AND SETTLEMENT. See MASTER AND SERVANT, 10. MUNICIPAL CORPORATIONS, 12.

CONDEMNATION of land. See RAILROADS, 1–4.

CONDITIONAL SALES. See CORPORATIONS, 3–5.

CONDITIONS PRECEDENT. See DIVORCE, 6. INTOXICATING LIQUORS, 4, 6.

CONFESSIONS. See EVIDENCE, 2, 3.

CONSIDERATION. See BILLS AND NOTES, 4, 6. CONTRACTS, 1. MUNICIPAL CORPORATIONS, 10.

CONSOLIDATION of actions. See ACTION.

CONSPIRACY. See EVIDENCE, 2, 3. VENDOR AND PURCHASER, 7–19.

CONSTITUTIONAL LAW.

Federal and state regulation of commerce. See CORPORATIONS. MASTER AND SERVANT, 6. RAILROADS, 10, 11. TAXATION, 2, 3.

Legislative power. See COUNTIES, 2, 3. COURTS. HIGHWAYS, 3–6. MUNICIPAL CORPORATIONS, 1. STATUTES, 1–3. TAXATION, 1–20, 30, 31, 33, 34.

1. In determining whether a particular agency may be employed by the state or some particular subdivision thereof by legislative authorization to perform any particular work, the test is not whether the agency is public, but whether the purpose is public within the legitimate functions of our constitutional government. *State ex rel. La Crosse Public Library v. Bentley,* 632

Police power. See RAILROADS, 1.

Judicial power. See COURTS. RELIGIOUS SOCIETIES. TAXATION, 25.

Foreign judgments: Faith and credit. See DIVORCE, 4–6.

Personal civil and political rights: Liberty of speech, etc. See ELECTIONS.

Same: Right to jury trial. See EQUITY, 2. JURY. PHYSICIANS AND SURGEONS, 5.

Vested rights. See STATUTES, 5.

Equal protection of the laws. See HIGHWAYS, 4. PHYSICIANS AND SURGEONS, 5. TAXATION, 4–9.

2. A corporation is a person within the meaning of the Fourteenth amendment to the federal constitution, and under that amendment a state cannot discriminate against its own citizens and in favor of citizens of other states any more than it can do the reverse. *Northwestern Mut. L. Ins. Co. v. State,* 484

Due process of law. See INTOXICATING LIQUORS, 5.

CONSTRUCTIVE NOTICE. See VENDOR AND PURCHASER, 1.

CONTRACTS.

Requisites and validity. See CORPORATIONS. FRAUDS, STATUTE OF. NOVATION.

Same: Parties. See PRINCIPAL AND AGENT.

Same: Consideration. See BILLS AND NOTES, 4, 6. MUNICIPAL CORPORATIONS, 10.

1. An oral agreement on the one side to render personal services and on the other to pay for such services in a certain way is not void for lack of consideration, even though no money be paid at the time, each promise being the consideration for the other. *Huebner v. Huebner,* 166

Construction. See INSURANCE, 1. LANDLORD AND TENANT, 3. MASTER AND SERVANT, 10. SALES, 1–3, 5.

2. Where an instrument is capable of different constructions, each of which does no violence to the language used, recourse may be had to the facts and circumstances surrounding the parties at the time of the execution thereof, for the purpose of determining its true construction, and the intention of the parties, if at all consonant with the language used, must govern its construction. The court, if possible, must give force and effect to every part of the instrument, reading nothing into it and nothing out of it. *Polebitzke v. John Week L. Co.* 322

Same: Contracts for benefit of third persons. See BONDS.

3. A contract to pay a debt due to a third person is presumably for his benefit and creates a liability to him unless a contrary intention appears. *Concrete Steel Co. v. Illinois Surety Co.* 41

Reformation. See REFORMATION OF INSTRUMENTS.

Rescission. See VENDOR AND PURCHASER, 4–6.

Specific performance. See ADOPTION, 2. SPECIFIC PERFORMANCE.

Performance or breach: Building contracts. See BONDS.

Same: Deductions from contract price.

4. Where a building contract has been substantially, though not exactly, performed, the deduction to be made from the contract price on account of any defect is the reasonable cost of remedying the defect if this can be done without reconstructing a substantial part of the building; otherwise, the diminished value of the building, on the basis of the contract price, by reason of the defect. *Buchholz v. Rosenberg,* 312

Actions for breach. See MASTER AND SERVANT, 1. STATUTES, 5.

CONTRIBUTORY NEGLIGENCE. See AUTOMOBILES, 4, 5. MASTER AND SERVANT, 13, 18–20. NEGLIGENCE, 3, 5. RAILROADS, 15. STREET RAILWAYS, 2, 6.

CONVEYANCES. See DEDICATION, 2. DEEDS. EXECUTORS, 1. FRAUDULENT CONVEYANCES. MORTGAGES, 1. NAVIGABLE WATERS. REFORMATION OF INSTRUMENTS, 2–4. VENDOR AND PURCHASER, 20, 21.

CORPORATIONS.

Identity: One owning the stock of another: When notice to one is notice to the other. See MECHANICS' LIENS, 1.

Rights of members. See RELIGIOUS SOCIETIES.

Stock: Sale: Profits as income. See TAXATION, 31.

Dividends: Surplus and undivided profits. See TRUSTS AND TRUSTEES, 1, 2, 5, 7.

Taxation of income: Mining company: Deductions. See TAXATION, 32.

Taxation of life insurance companies. See TAXATION, 2–14.

Bankruptcy. See PARTIES.

Foreign corporations: Contracts: Validity: Interstate commerce.

1. A contract made in this state with an unlicensed foreign corporation, but which is not to be complete so as to be binding upon such corporation until approved at its home office outside the state, is not void under sec. 1770*b*, Stats. *Charles A. Stickney Co. v. Lynch,* 353
2. Provisions in such contract that the foreign corporation shall furnish certain property f. o. b. in this state, and for the filling of orders for goods by such corporation and subsequent taking of securities therefor, relate to matters of interstate commerce and are not within said sec. 1770*b*. *Ibid.*
3. A piano brought into Wisconsin under a conditional bill of sale, the title being retained by a foreign corporation, remained an article of interstate commerce while unpaid for in the possession of the original buyer. *Regina Co. v. Toynbee,* 551
4. Where the conditional bill of sale was duly filed, a sale of the piano by the original buyer to a person having no actual knowledge of the conditional sale, and its removal to another place, did not alter the status of the piano as an article of interstate commerce or affect the rights of the foreign corporation, the original seller. *Ibid.*
5. Where, in such case, the foreign corporation, still retaining title to the piano, took a note of the second buyer for the amount remaining unpaid, the transaction being in form a conditional sale reserving title in the corporation until the note was paid, this amounted merely to the taking of additional security and holding the piano as an article of interstate commerce until the debt was paid,—which the corporation might do without having complied with sec. 1770*b*, Stats. *Ibid.*

Same: Insurance companies: Taxation. See TAXATION, 8, 10.

Municipal corporations. See MUNICIPAL CORPORATIONS.

CORPUS of trust estate. See TRUSTS AND TRUSTEES.

CORROBORATION. See CRIMINAL LAW, 8.

CORRUPT PRACTICES. See ELECTIONS.

COSTS.

See APPEAL, 24. DIVORCE, 8. EJECTMENT, 2. GARNISHMENT, 2. WILLS, 2.

Costs of printing respondents' brief, which violated Supreme Court Rule 11, are not allowed in this case although such violation was satisfactorily explained. *Mitchell v. Lyons,* 399

COUNTERCLAIM. See MASTER AND SERVANT, 8.

COUNTIES.

County board: Powers: Division of towns, etc.: Legalizing acts.

1. Ch. 17, Laws 1915, legalizing "all acts and proceedings" of the county board of Vilas county "relating to the detaching of certain territory" from one town and attaching parts thereof to other towns, "and in creating" two new towns from other parts thereof, validated all the proceedings of the board relating to such readjustment and rearrangement of the town government

in the county, including the apportionment of the net indebtedness of the town from which the territory was detached. *State ex rel. Ervin v. County Board,* 577

2. Although, under sec. 672, Stats., the county board had no authority to apportion such indebtedness, the legislature, since it might have given such authority, could validate the unauthorized apportionment. *Ibid.*

Officers: Board of administration: Election or appointment.

3. In ch. 402, Laws 1915,—providing for a board of administration in counties of 250,000 inhabitants or more to manage and control certain county institutions,—the provision that two of the five members of such board shall be appointed by the governor of the state does not contravene sec. 9, art. XIII, Const. The members of the board, being officers whose offices have been created by law subsequent to the adoption of the constitution, may, as provided in said section, "be elected by the people or appointed, as the legislature may direct." *State ex rel. Langland v. Manegold,* 69

Same: Powers as to highways: Auditing claims, etc. See HIGHWAYS, 6–8.

County system of state highways. See HIGHWAYS, 3–9.

COURTS.

See JUDGES. RELIGIOUS SOCIETIES, 2.

Supreme court: Original jurisdiction: Actions against state.

1. Under sec. 3, art. VII, Const., providing that "the supreme court, *except in cases otherwise provided in this constitution,* shall have appellate jurisdiction only," and sec. 27, art. IV, Const., providing that "the legislature shall direct by law in what manner and in what courts suits may be brought against the state," the legislature had power—by sec. 3200, Stats.—to designate the supreme court as the court in which such suits might be brought. *Dickson v. State,* 1 Wis. 122, followed. *Northwestern Mut. L. Ins. Co. v. State,* 484

2. Although a claim presented to the legislature for recovery of license fees paid by a life insurance company was based chiefly on the contention that the whole tax was invalid because of the unconstitutionality of the law under which it was exacted, yet the further distinct assertion therein that, even if the law were to be held constitutional, portions of the amount collected were illegal and should be refunded, was sufficient under sec. 3200, Stats., to give this court jurisdiction of that part of the claim. *Ibid.*

Same: Appellate jurisdiction. See APPEAL AND ERROR. INFANTS. STATUTES, 9.

Superior court of Fond du Lac county. See JUDGES.

County courts. See JUDGES.

CREDITORS' ACTION. See EXECUTORS, 4.

CRIMINAL LAW AND PRACTICE.

Accessories: How prosecuted.

1. Under our statute (secs. 4613–4615, Stats. 1915) an accessory before the fact must still be prosecuted as such; but it is not essential to his conviction that the principal felon be prosecuted or convicted, it being sufficient that the guilt of the principal felon be proved. The words "substantive felony" in sec. 4614 do not mean the principal felony, but merely a felony not de-

pendent on the conviction of another person for another crime. *Karakutza v. State,* 293

Prior conviction affecting punishment: Pleading. See INDICTMENT AND INFORMATION, 2, 3.

Counsel assisting prosecutor. See PHYSICIANS AND SURGEONS, 1, 2.

Pleading. See INDICTMENT AND INFORMATION. PHYSICIANS AND SURGEONS, 3, 4.

Evidence.

2. Upon a trial for murder the evidence, though wholly circumstantial, is *held* sufficient to sustain a conviction. *Karakutza v. State,* 293
3. The admission in evidence in such case of Turkish gold pieces of the same denomination as certain gold pieces shown to have been in the possession of the murdered man, and of a pistol of the same caliber as that with which he was shot,—all of which were found in defendant's room on the day following the murder,—was proper. *Ibid.*
4. Upon a trial for sodomy, it was error to permit the defendant to be asked on cross-examination whether he did not have improper relations with a certain person, naming him, other than the complaining witness. *Abaly v. State,* 609
5. Testimony that the reputation of the defendant was bad was incompetent, where the witness based his opinion of such reputation upon stories and talk which he had heard after the prosecution had been commenced. *Ibid.*

Trial: Instructions to jury: Waiver of objections.

6. At the trial upon an information charging murder only it was error to instruct the jury upon the subject of an accessory; but no objection having been made at the time on behalf of defendant, and the court, in connection with its charge on that subject, having given an instruction requested by defendant's counsel which practically covered the same ground, any objection to the charge must be deemed to have been waived and the conviction is affirmed. If, however, there were grave doubt as to defendant's guilt there might be a reversal notwithstanding such waiver. *Karakutza v. State,* 293

Same: Requested instructions: Alibi: Corroboration.

7. The state in making its case proved that the alleged offense was committed on March 13th and upon no other day. The main defense was an *alibi,* and there was strong evidence thereof. On rebuttal the state undertook to show that the complaining witness might have been mistaken as to the day and that the crime might have been committed on some other day. The court charged the jury that the vital question for them to determine was whether defendant committed the crime upon any day in March. *Held,* that even if there was no affirmative error in such charge (a point not decided) the jury should have been further instructed that if the testimony of the complaining witness was correct as to the date and if the evidence of an *alibi* was sufficient to prove the defendant's absence from the city on that date, or raised a reasonable doubt as to his presence, he was entitled to be acquitted. *Abaly v. State,* 609
8. It was error in this case to refuse a requested instruction to the effect that the jury should use great caution in weighing the testimony of the complaining witness, that it is ordinarily unsafe to convict upon the uncorroborated testimony of an accom-

plice, and that upon the actual commission of the crime charged the complaining witness was not corroborated by any other witness. *Ibid.*

Appeal and error. See CRIMINAL LAW, 6.

9. Where, upon the whole record, the supreme court is convinced that the defendant did not have a fair trial, and is unable to say that justice has been done, a new trial should be ordered. *Abaly v. State,* 609

Unlawful practice of medicine. See PHYSICIANS AND SURGEONS, 1–5.

CROSS-COMPLAINT. See JURY. PLEADING, 3, 4.

CRUELTY. See DIVORCE, 1–3.

DAMAGES.

Liquidated damages. See INTOXICATING LIQUORS, 7.

Exemplary or punitory damages. See LIBEL AND SLANDER, 4, 5.

Measure of damages. See FRAUD, 6. SALES, 6–8. VENDOR AND PURCHASER, 7, 14–19.

Same: Loss of profits: Evidence.

1. Past profits of an established business are a legitimate basis for estimating the future profits of the same business conducted in the same manner; and in a proper case such future profits may be recovered when the plaintiff has been prevented from making them by the wrongful conduct of the defendant. *Huebner v. Huebner,* 166

Excessive damages.

2. An award of $3,200 for serious injuries to a school teacher, caused by the sudden starting of a street car from which she was alighting, is *held* not so excessive as to show that the jury was actuated by passion or prejudice. *Prellwitz v. Milwaukee E. R. & L. Co.* 84

3. It appearing that plaintiff's injuries, aside from the disease not shown to have been caused by the accident in question, consisted of slight cuts and bruises which healed very quickly and a pain in the side which had disappeared in three months, an award of $725 is *held* excessive and he is given an option to take judgment for $400 or a new trial. *Slack v. Joyce,* 567

Evidence: Cannot rest in conjecture. See EVIDENCE, 8.

Award of damages in equitable action. See EQUITY. VENDOR AND PURCHASER, 7, 8.

DAMNUM ABSQUE INJURIA. See RAILROADS, 1.

DANGEROUS ARTICLES: Liability of manufacturer. See NEGLIGENCE, 4.

DEBTOR AND CREDITOR. See ACCOUNT STATED. BILLS AND NOTES. CHATTEL MORTGAGES. EXECUTORS, 1–4. FRAUDULENT CONVEYANCES. MORTGAGES. NOVATION. VENDOR AND PURCHASER, 20, 21.

DECEIT. See FRAUD.

DEDICATION.

See PLATTING LANDS.

1. A highway by parol dedication and user being limited by the extent of such user, a fence which has stood in its present location and marked the east line of such a highway for upwards of fifty years establishes the line of such highway at the place in question. *Cronin v. Janesville T. Co.* 436

2. Land on the west side of a highway by user was platted by the owners, and on the plat the highway was represented as being four rods wide, with its center line on their eastern boundary. East of such center line, however, within the limits of the highway so represented, an old fence marked the east line of the highway by user, and the land east thereof was occupied up to such fence. Afterwards the owners who made said plat bought the land east of the highway, but the fence remained and the occupancy up to it continued. Later said owners conveyed the last mentioned land to plaintiff, describing it as bounded on the west by the highway—not by the highway according to the plat. *Held*, that the old fence continued to mark the east line of the highway, there never having been any effective dedication of any land east of it. *Ibid.*

DEEDS.

See DEDICATION, 2. FRAUDULENT CONVEYANCES. JUDGMENT, 1. MORTGAGES, 1. REFORMATION OF INSTRUMENTS, 2–4. VENDOR AND PURCHASER, 20, 21.

Construction.

1. A conveyance, made in 1878 to a corporation engaged in logging, of land in lots 1 and 2 in a certain section, described as follows: "One rod wide along the meandered shore bordering on the Wisconsin river, including lake and bayous leading into the Wisconsin river, for the purpose of rafting and boomage," is construed to cover one rod in width from the ordinary high-water mark, rather than from the normal or usual stage of the river,—it appearing that there were no bayous on lots 1 and 2 in a normal stage of the water, and the construction adopted being in harmony with the purpose for which the land was bought, with the purchase price, with the language used, and with the practical construction given the conveyance by the parties. *Polebitzke v. John Week L. Co.* 322

2. A deed describing the land conveyed as bounded on one side by a certain road gave the vendee title to the center of the highway, there being no words in the deed expressly or necessarily limiting the boundary to the side of the highway. *Cronin v. Janesville T. Co.* 436

DE FACTO OFFICERS. See OFFICERS.

DEFINITIONS. See WORDS AND PHRASES.

DELAY. See ACCOUNT STATED. MORTGAGES, 1. REFORMATION OF INSTRUMENTS, 3, 4.

DELEGATION of power of taxation. See TAXATION, 1.

DELIVERY of goods. See SALES, 4, 6–8.

DEMURRER. See APPEAL, 8.

DESCENT AND DISTRIBUTION. See EXECUTORS, 5, 6.

DESCRIPTION OF LAND. See DEEDS.

DISCHARGE.
Of employee. See MASTER AND SERVANT, 1–5.
Of indorsers. See BILLS AND NOTES, 3–6.
Of sureties. See BONDS, 4, 5.

DISCLAIMER of title. See QUIETING TITLE, 2.

DISCRETION. See JUDGMENT, 2. PLEADING, 5.

DISMISSAL.
Of appeal. See APPEAL, 20. EXECUTORS, 4.
Of action. See APPEAL, 6, 22, 23. QUIETING TITLE, 2.

DISTRICT ATTORNEY.

See PHYSICIANS AND SURGEONS, 1, 2.

Under sub. 1, sec. 752, Stats. 1915, the district attorney has authority to prosecute an action to recover the penalty on a liquor license bond for breach thereof, the state being interested. *State v. Helmann*, 639

DITCHES. See DRAINS.

DIVIDENDS. See TRUSTS AND TRUSTEES, 1, 5, 8.

DIVISION of property. See DIVORCE, 4–7.

DIVORCE.

Grounds: Cruel and inhuman treatment: Findings.

1. A divorce may be granted on the ground of cruel and inhuman treatment even though no actual impairment of the plaintiff's health was caused by defendant's conduct, if that conduct was such as naturally to cause great mental suffering to the plaintiff and render impairment of health probable, so that further efforts to perform conjugal duties would be dangerous. *Hiecke v. Hiecke*, 171

2. In the absence of a specific finding of fact that the long continued ill-treatment of the plaintiff wife by defendant (as to which the court made detailed findings) imperiled her health, made the marriage state intolerable, and rendered her incapable of performing the duties of a wife, a conclusion of law that she was entitled to a judgment of divorce may be treated as inferentially finding those facts; but a specific finding on the subject would be much more satisfactory. *Ibid.*

Defenses: Recrimination.

3. Misconduct of the plaintiff, if not in itself a ground for divorce, will not preclude the granting of a divorce on the ground of the defendant's misconduct, but may properly be considered on the question whether it so far provoked defendant's misconduct (in this case his alleged cruel and inhuman treatment of the plaintiff) that a divorce should not be granted on that ground. *Hiecke v. Hiecke*, 171

Jurisdiction: Foreign judgment: Effect: Property rights.

4. A judgment of divorce granted in another state in an action between parties domiciled there and after personal service of the summons and complaint on the defendant, so that the court had jurisdiction both of the subject matter and of the parties, must be given full faith and credit in this state and is binding upon the defendant husband as to all rights that inhered in and arose out of the marital relation. *Cook v. Cook*, 56 Wis. 195, distinguished. *Zentzis v. Zentzis*, 342

5. Where no provision was made in such a judgment for alimony or a division of property the defendant husband cannot, in an ancillary or an independent action in this state, obtain a division of, or recover an interest in, real property located here which he had, prior to the divorce action, conveyed to his wife. *Ibid.*

6. The defendant might, in the divorce action, have asked to have his rights in such real property determined and adjudicated; and the court of the other state might, as a condition of granting relief to the plaintiff wife, have required her to reconvey such property, or a part thereof, to the husband. *Ibid.*

Division of property.

7. The division of property in this case is sustained, it not clearly appearing to be a departure from the general rule that a liberal allowance to the divorced wife is one third in money value of the husband's property, which may be increased to one half or more for special circumstances. *Hiecke v. Hiecke,* 171

Effect of judgment on wife's right under life insurance policy. See INSURANCE, 6.

Costs in divorce action.

8. Allowance, in the taxation of costs in a divorce action, of $25 as expenses incurred by a court commissioner, before whom the defendant was examined, in listing and numbering checks, is *held* not to have been improper. *Hiecke v. Hiecke,* 171

DOCKS and terminal property of railroads. See TAXATION, 15–20.

DRAINS.

1. A railway company which, in compliance with sec. 1379—29, Stats., opened bridges on its right of way to permit the passage through them of a drainage ditch and the dredges constructing it, may maintain an action against the drainage district for the expense incurred in so opening its right of way. *Chicago, M. & St. P. R. Co. v. Lemonweir River D. Dist.* 135 Wis. 228, distinguished. *Chicago, M. & St. P. R. Co. v. Shepard D. Dist.* 385

2. The complaint in such an action is not defective because it fails to show that the amount claimed was included in the cost of construction, or that, if so included, the assessment for benefits would be still equal to or greater than the assessment for cost of construction. *Ibid.*

DUE PROCESS OF LAW. See INTOXICATING LIQUORS, 5.

EJECTMENT.

Evidence. See BOUNDARIES.

Judgment.

1. In ejectment, where the jury found in favor of defendants as to the land in dispute, plaintiff was not entitled to judgment for an adjoining piece of land which the jury found belonged to him but which was not included in the complaint and was conceded, without controversy, to be his, although it had been inclosed with defendants' land by a fence built by consent of both parties. *Nickel v. Chapman,* 348

New trial: Costs.

2. Where, as a condition of having a new trial in ejectment, defendants were required to pay the costs of a former trial, they were not entitled, upon recovering in the new trial, to tax said costs of the former trial against plaintiff. *Nickel v. Chapman,* 348

ELECTION.

Not to claim allowances. See EXECUTORS, 3.

As to remedies. See INJUNCTION, 3.

ELECTIONS.

Corrupt Practices Act: Validity: Liberty of speech.

1. By sec. 12.05, Stats. 1915, a mere private citizen, not a candidate or member of a personal or party committee, residing in one county, was forbidden to spend money in another county in investigating the governmental, political, and financial affairs of the state and communicating the results of his investigations to the electors of the state generally, for the purpose of influencing the voting at a general election. *State v. Pierce,* 615
2. In forbidding such acts said sec. 12.05 contravenes sec. 3, art. I, Const., which provides that "every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or of the press." *Ibid.*
3. Said sec. 12.05 not having been the inducement to or the compensation for the remainder of the Corrupt Practices Act, its invalidity does not affect the validity of the other parts of the act. *Ibid.*

ELEVATORS and other terminal property of railroads. See TAXATION, 15–20.

EMINENT DOMAIN. See RAILROADS, 1–4.

EMPLOYERS' LIABILITY. See MASTER AND SERVANT, 6–20. RAILROADS, 10, 11. WORKMEN'S COMPENSATION.

EQUAL PROTECTION OF THE LAWS. See CONSTITUTIONAL LAW, 2.

EQUITY.

See APPEAL, 12. DIVORCE. INJUNCTION. INTOXICATING LIQUORS, 3–5. JUDGMENT, 2, 3. MORTGAGES. REFORMATION OF INSTRUMENTS. SPECIFIC PERFORMANCE. VENDOR AND PURCHASER, 7, 8, 13.

1. Where an action has been commenced in good faith to obtain equitable relief, and it subsequently appears that such relief cannot or ought not to be granted, but plaintiff is shown to have suffered a remediable wrong in the transaction forming the groundwork of the action, entitling him to be compensated by money damages, the court may, and where justice clearly requires it should, retain the cause and afford such relief, and make the same efficient by providing for a recovery as in an ordinary legal action or by provisions appropriate to a judgment for equitable relief, as may be best suited to the circumstances of the particular case. *McLennan v. Church,* 411
2. Although the facts of a case warrant only legal relief and were known to the plaintiff when he commenced his action for equitable relief, the court may in such action grant the legal relief, where the constitutional right of trial by jury would not be unduly prejudiced. *Ibid.*

ESTATES.
In land. See HUSBAND AND WIFE. WILLS, 5–8.
Of decedents. See EXECUTORS. INFANTS. WILLS.

ESTOPPEL.

See BILLS AND NOTES, 3–5. MASTER AND SERVANT, 9. VENDOR AND PURCHASER, 7.

1. If a person acts in his business relations with another under such circumstances as to charge him with knowledge that such other

may probably rely thereon to his damage in case of such person's conduct thereafter being inconsistent with his former actions, and such other does in good faith so rely, such person cannot so change his position to such other's prejudice. *Union Bank v. Commercial Securities Co.* 470

2. Where a town board had no authority or jurisdiction to pave a street or to levy a special assessment therefor on abutting property, an owner of such property who acquiesced in the doing of the work is not estopped to question the validity of the assessment. *Gertz v. Vaughn,* 557

EVIDENCE.

Presumptions. See ACCOUNT STATED. CONTRACTS, 3. LIBEL AND SLANDER, 1, 2.

Relevancy, materiality, and competency. See BOUNDARIES. CRIMINAL LAW, 3–5. FRAUD, 5. STATUTES, 12. WITNESSES, 3, 4.

1. In an action for injuries sustained in a collision between plaintiff's bicycle and defendant's automobile, evidence offered by defendant to show that her chauffeur was an unusually careful, painstaking driver with regard to persons or vehicles on the street was incompetent. *Slack v. Joyce,* 567

Privileged communications. See WITNESSES, 2.

Admissions: Confession by co-conspirator: Abandonment of conspiracy.

2. Where the nature of an alleged confession—in this case a confession by a husband to the fire marshal that he and his wife had set the fires which destroyed their insured property—was such as to arouse a suspicion that it was not made freely and intelligently, and the circumstances under which it was made were consistent with that view, there was no prejudicial error in instructing the jury that the alleged admissions were not entitled to weight unless the jury were satisfied that they were freely made and not under such compulsion, threats, intimidation, promises of immunity, or persuasion as to prevent him from being a free agent in the matter. *Campbell v. Germania F. Ins. Co.* 329

3. The husband in such case must have known that if the fact were established that he and his wife set the fires it would be fatal to the full accomplishment of any conspiracy by them to burn the property and collect the insurance; hence, on the theory that a confession by him would evidence an abandonment of the conspiracy, it was not error, in an action by the wife on the insurance policy, to instruct the jury that if such a conspiracy was formed, as claimed by the defendant, but had been abandoned by the husband before the alleged confession was made, no weight should be given to the evidence of such confession. *Ibid.*

Parol evidence affecting writings. See BILLS AND NOTES, 1.

Opinion evidence. See EVIDENCE, 8.

Evidence at former trial: When admissible.

4. A witness being absent from the state at the time of the second trial of the action, his testimony given at the first trial was admissible under sec. 4141*a*, Stats., where the issues of fact were the same at both trials, although the first trial went on the theory that the rights of the parties were governed by the common law and the second on the theory that such rights were governed by a statute (ch. 485, Laws 1911) which abrogated the common law. *Szeliwicki v. Connor L. & L. Co.* 20

5. It was not error to permit the testimony of such witness to be read as it appeared in the bill of exceptions on appeal from the judgment rendered at the first trial. *Ibid.*

6. The "retrial, other action, or proceeding" in which, under sec. 4141*a*, Stats., the testimony of a deceased witness or a witness who is absent from the state is, under certain conditions, admissible, is a retrial of the same action in which such testimony was originally taken, or other action or proceeding involving the same issues and between the same parties. *Pfeiffer v. Chicago & M. E. R. Co.* 317

7. Thus, where two persons were injured in a collision with an interurban car, the testimony of one of them, taken in his action against the corporation alleged to be responsible, is not admissible, by reason of his absence from the state, in an action to recover for the injury and death of the other person. *Ibid.*

Weight and sufficiency. See ADOPTION. BILLS AND NOTES, 7. BRIDGES. CRIMINAL LAW, 2, 8. EVIDENCE, 2, 3. FRAUD, 3. FRAUDULENT CONVEYANCES, 1, 2. LANDLORD AND TENANT, 1. MASTER AND SERVANT, 12, 13, 20. MECHANICS' LIENS, 1. MUNICIPAL CORPORATIONS, 9. NEGLIGENCE, 3, 5. NOVATION, 3. PHYSICIANS AND SURGEONS, 8. PRINCIPAL AND AGENT. RAILROADS, 5, 13–15. RAPE. REFORMATION OF INSTRUMENTS, 1. SALES, 4, 5. SPECIFIC PERFORMANCE. STREET RAILWAYS, 1, 2, 5, 6. WITNESSES, 2.

8. It appearing that four or five weeks after a collision between plaintiff's bicycle and defendant's automobile plaintiff contracted typhoid fever, and that food, water, and air are the only media by which typhoid can be communicated, testimony of the attending physician that in his opinion there was a connection between plaintiff's sickness and the accident and that he considered this all the time, but not explaining what he meant by "connection" between them, was insufficient to warrant the jury in finding that the disease was caused by or had any connection with the injury. To form a basis for damages in such a case, the connection must rest upon proof and cannot be left to surmise or conjecture. *Slack v. Joyce,* 567

Offer of evidence: Waiver of right to have question answered. See TRIAL, 3.

Objections: Waiver. See APPEAL, 15.

Rulings on evidence: Review on appeal. See APPEAL, 9, 13, 15, 16. MASTER AND SERVANT, 16.

EXAMINATION.
Of offenders. See INDICTMENT AND INFORMATION, 1.
Of witnesses. See WITNESSES, 3.

EXCESSIVE DAMAGES. See DAMAGES, 2, 3.

EXCISE LAWS. See INTOXICATING LIQUORS.

EXECUTION. See FRAUDULENT CONVEYANCES, 4. REPLEVIN, 4, 5.

EXECUTORS AND ADMINISTRATORS.

See WILLS.

Rights in collaterals pledged by decedent. See BILLS AND NOTES, 8.

Fraudulent conveyance by decedent to wife: Subjecting property to debts: Rights of widow: Allowances: Parties.

1. Where, a few days prior to his death, a husband, without consideration and with intent to defraud his creditors, transferred his real and personal property to his wife, who knew his purpose and colluded with him to carry it out, and his estate was insuf-

ficient to pay his debts, judgment was properly entered pursuant to secs. 3835, 3836, Stats. 1915, declaring such transfer void as to creditors of the decedent and subjecting the property to the payment of his debts; and, the administration of the estate having been closed and the administrator discharged, a receiver of said property in the hands of the wife was properly appointed. *Baldwin v. Frisbie,* 26

2. Although in such case the widow paid some of the debts of the decedent out of her individual estate, her connection with the fraudulent transfer deprives her of all right to reimbursement out of the proceeds of a sale by the receiver of the property so transferred. *Ibid.*

3. Having elected not to claim her allowances when the husband's estate was being administered, the widow is not, under the circumstances above stated, entitled to have such allowances made to her out of the property involved in the fraudulent transfer. *Ibid.*

4. The administrator of the husband's estate, having been duly discharged, was not a proper party to the creditor's action, and an appeal by him from the judgment setting aside the fraudulent transfer and appointing a receiver is dismissed. *Ibid.*

Settlement of estate: Discharge of executors and trustees.

5. Assuming the will to be valid, final settlement of the estate and discharge of the executors and trustees was properly adjudged, it appearing that they had executed their trust as fully as the scheme of the will was capable of execution and to the satisfaction of the persons interested, all of whom participated in and assented to the various transactions and the administration of the estate resulting in the order of distribution and discharge. *Will of Allis,* 452

6. If, on the other hand, the will be deemed void, the same result follows, the entire estate having been distributed to the widow and heirs at law of the testator in accordance with an agreement made by them. *Ibid.*

EXEMPTIONS. See TAXATION, 21–26.

FALSE REPRESENTATIONS. See FRAUD. MASTER AND SERVANT, 7–9. VENDOR AND PURCHASER, 2–6.

FEDERAL AND STATE STATUTES. See MASTER AND SERVANT, 6. RAILROADS, 10, 11.

FENCES. See DEDICATION. EJECTMENT, 1. RAILROADS, 5–9.

FIDUCIARY RELATION.

See VENDOR AND PURCHASER, 2, 3.

A fiduciary relation exists when confidence is reposed on one side and there is a resulting superiority and influence on the other; and the relation and duties involved in it need not be legal, but may be moral, social, domestic, or merely personal. *Miranovitz v. Gee,* 246

FINDINGS OF FACT. See APPEAL, 1, 2, 10–12. BILLS AND NOTES, 5. DIVORCE, 2. TRIAL, 5.

FINES: Cumulation. See MUNICIPAL CORPORATIONS, 6.

FIRE INSURANCE. See INSURANCE, 1, 2.

FLAGMAN at crossing. See RAILROADS, 15.

FORECLOSURE. See MORTGAGES, 2. VENDOR AND PURCHASER, 7, 8.

FOREIGN CORPORATIONS. See CORPORATIONS. TAXATION, 8, 10.
FOREIGN JUDGMENTS. See DIVORCE, 4–6.
FOREIGN STATUTES. See STATUTES, 12.
FRATERNAL BENEFIT SOCIETIES. See TAXATION, 9.

FRAUD.

See FRAUDULENT CONVEYANCES. INTOXICATING LIQUORS, 2. LANDLORD AND TENANT, 1–3. MORTGAGES, 2. VENDOR AND PURCHASER, 2–19.

1. Fraud in law is remediable as well as fraud in fact. *McLennan v. Church,* 411
2. Although made in good faith, false statements are actionable if material and relied upon by the party to whom they are made. *Miranovitz v. Gee,* 246
3. Findings by the jury to the effect that defendant knowingly made false representations as to the health of cattle sold by him to plaintiff and as to their having been tested for tuberculosis, are *held* to be sustained by the evidence. *Welch v. Dunning,* 535
4. The jury answered affirmatively the first two questions in the special verdict, as to representations made by defendant. Question 3 was: "If you answer questions 1 and 2 or either of them Yes, was such representation false?" This was answered Yes. *Held,* that the jury thereby found that the representations referred to in questions 1 and 2 were both false. *Ibid.*
5. For the purpose of showing that defendant knew that cattle shipped by him to plaintiff were not healthy, it was competent to prove that he had had trouble in previous recent shipments of cattle on account of their having tuberculosis. *Ibid.*
6. For false representations as to health of cattle sold and shipped by defendant to plaintiff in Dakota, the latter was entitled to recover the difference between their value if they had been as represented and their value in the condition in which they were when in plaintiff's possession in Dakota; also the sums reasonably expended in railway travel and in transporting the cattle to Dakota, in caring for them on the way and while they were still under plaintiff's care in Dakota, together with the amount necessarily expended in testing the cattle, destroying their carcasses, and disinfecting the buildings in which they had been kept. *Ibid.*

FRAUDS, STATUTE OF.

The fact that an oral agreement was originally made more than a year before it was to be performed does not render it void under sec. 2307, Stats., if it was reiterated within such year. *Huebner v. Huebner,* 166

FRAUDULENT CONVEYANCES.

See EXECUTORS, 1–4. MORTGAGES, 2. TENANCY IN COMMON.

1. A finding by the trial court that a conveyance by a mortgagor to his sister, after the commencement of a foreclosure action, of certain property not covered by the mortgage was without consideration and made with intent to defraud his creditors and particularly the mortgagee, is *held* to be sustained by the evidence. *Mahoney v. Kurth,* 56

2. Findings by the trial court to the effect that conveyances by husband to wife were not made with any fraudulent intent, but solely in pursuance of his idea to retire from business and provide for the disposition of his estate during his life, are *held* to be sustained by the evidence. *Ripon H. Co. v. Haas*, 592
3. A mortgage and deed executed to hinder and delay creditors were properly set aside. *Mitchell v. Lyons*, 399
4. The purchaser of land at an execution sale to whom a deed has been issued may maintain an action in equity to set aside conveyances in fraud of creditors made before the judgment was docketed. *Ibid.*

FRAUDULENT REPRESENTATIONS. See FRAUD.

FREEDOM OF SPEECH. See ELECTIONS.

FREIGHT. See SALES, 2, 3.

GARNISHMENT.

1. In an action by a subcontractor against the principal contractor, wherein the owner was garnishee, interest upon the amount found due to the principal contractor from the date when it became due was properly allowed against the garnishee. *Buchholz v. Rosenberg*, 312
2. In a garnishment action, upon the trial of an issue between the plaintiff and the garnishee, the plaintiff is entitled, under sec. 2772, Stats. 1913, to costs against the garnishee if he recovers more than the garnishee admits in his answer. *Ibid.*

GIFTS of public property. See MUNICIPAL CORPORATIONS, 10.

GRADE CROSSINGS. See RAILROADS, 1, 2.

GROSS NEGLIGENCE. See AUTOMOBILES, 5.

GUARDIAN AND WARD.

Sale by guardian. See VENDOR AND PURCHASER, 1.

Release of claim for damages. See MASTER AND SERVANT, 10.

Claims: How barred.

Sec. 3995*b*, Stats., is the only statute providing for barring claims against persons under guardianship; and where that section was not complied with in that no petition was filed and no order of the county court fixed a time and place for the examination and adjustment of claims or fixed a time after which claims, if not presented, should be barred, claims were not barred otherwise than by the ordinary statutes of limitation. *Gardner v. Young's Estate*, 241

GUARDIANS AD LITEM. See INFANTS.

HARMLESS ERRORS. See APPEAL, 13–16.

HIGHWAYS.

Dedication and user: Boundaries. See DEDICATION.

Appeal from order laying out highway: Notice: Jurisdiction.

1. In sec. 1276, Stats. 1913, providing that any person aggrieved by an order of town supervisors laying out a highway "may, within thirty days after such determination, appeal therefrom," the word "determination" refers to the filing of the written order in the town clerk's office, as required by sec. 1269, and not to the oral or mental decision of the supervisors. *Becker v. Jones*, 226

2. Upon such an appeal a failure to serve notice of the time and place for the appointment of commissioners upon at least two of the supervisors six days before such time, as required by sec. 1277, Stats. 1913, deprived the justice of jurisdiction of the subject matter; and such want of jurisdiction was not cured by subsequent voluntary appearance of the supervisors before the justice. *Ibid.*

County system of state highways: Exclusion of city streets: Taxing district: Validity of statutes.

3. The provisions of secs. 1317*m*—1 to 1317*m*—15, Stats. 1915, establishing the county as the highway district and imposing burdens on the taxable property therein for defraying the cost of improving and maintaining the highways of the county system, are valid, the law being general and operating uniformly throughout the state and upon the residents within each county. *Rinder v. Madison,* 525

4. The exclusion of city streets from the county system of highways, while town highways and connecting streets in villages may be included therein, is within the power of the legislature, and does not unreasonably discriminate against the rights of the residents of cities or deprive them of the equal protection of the laws. It does not affect the political rights of city residents differently than those of other residents of the counties in localities where the local highways are not made a part of the system. *Ibid.*

5. The classification of highways so made is legitimate; it is not arbitrary, but is based upon peculiar conditions in respect to construction, improvement, and use, which distinguish city streets from the highways in towns and villages. *Ibid.*

6. Sub. 8, sec. 1317*m*—5, does not unlawfully delegate to the county committee therein provided for constitutional powers or authority of the county board or county clerk—the powers and duties of the committee being administrative only. *Ibid.*

7. Par. (3) (e) of said sub. 8, making it the duty of said county committee to "audit," together with the county clerk, claims for services and material, is not to be interpreted as abrogating the duties imposed by law on county clerks, or as giving the committee the ultimate power to allow or disallow such claims. *Ibid.*

8. The authority given to the county highway commissioner by sub. 3, sec. 1317*m*—7, does not conflict with the authority of the county board to audit and determine the validity of claims, nor does that subsection repeal the laws in force at the time of its adoption as to the powers and duties of the county board and county clerk respecting claims against the county. *Ibid.*

Same: Taxing city for bridges in towns.

9. The property in a city which is required by law to maintain its own bridges is not taxable, under sec. 1319, Stats., for the building of bridges in towns. *Rinder v. Madison,* 525

Same: Withholding of highway taxes by city treasurer: Penalty. See TAXATION, 29.

Same: Powers of towns: Contributions of freeholders under invalid law: Recovery.

10. Independent of ch. 337, Laws 1911 (secs. 1317*m*—1 to 1317*m*—15, Stats. 1911), a town board had power under secs. 1223, 1232,

Stats., to expend money of the town upon its highways. *Grand Chute v. Herrick,* 648

11. Where, prior to the decision (*State ex rel. Carey v. Ballard,* 158 Wis. 251) holding invalid a part of ch. 337, Laws 1911, a town board, acting in good faith under that statute, turned over to the county treasurer a certain sum belonging to the town and an equal sum contributed by a group of freeholders, and said sums, together with moneys of the county and state, were expended pursuant to said act of 1911, under the supervision of the highway commission, upon a highway in the town, such action of the board was merely an irregular exercise of the power which it had under secs. 1223, 1232, Stats.; and the town having received full benefit of its money so expended and the electors having taken no action to restrain such expenditure, the town cannot recover such money from the members of the board. *Ibid.*

12. Nor can the money contributed by the freeholders be recovered by the town. Such money having been voluntarily paid to the town for a special purpose and having been expended for that purpose, the contributors have no claim therefor against the town. *Ibid.*

Powers of towns as to village streets: Assessments. See ESTOPPEL, 2. TOWNS.

Use of highways: Rules of the road. See AUTOMOBILES.

Injuries from defects. See BRIDGES.

HOMICIDE. See CRIMINAL LAW, 1–3, 6.

HORSES: Injuries. See BRIDGES.

HOSPITALS.

1. It is the duty of a private sanitarium and its employees at all times during the treatment of nervous and insane patients to use such means to restrain and guard them as would seem reasonably sufficient to an ordinarily prudent man under like circumstances to prevent them from escaping and injuring others; and for breach of that duty liability will arise, if such breach proximately causes injury to another. *Torrey v. Riverside Sanitarium,* 71

2. No breach of the duty above stated was shown in this case, it appearing, among other things, that the patient in question never exhibited symptoms of violence; that he came to defendant's sanitarium (a private one) voluntarily and was apparently normal and entirely tractable; that, at the time of his escape, which occurred while he was being transferred from a lower to an upper floor, there was a male attendant at his side; and that an attempt to place greater restrictions on his liberty might easily have resulted in exciting him and producing serious results. *Ibid.*

HUNTING in closed season. See LIBEL AND SLANDER, 1, 2.

HUSBAND AND WIFE.

See DIVORCE. EXECUTORS, 1–4. FRAUDULENT CONVEYANCES, 2. INSURANCE, 3–7. REFORMATION OF INSTRUMENTS, 1.

Where both husband and wife are the purchasers under a land contract she takes the whole property upon his death. *Church v. Nash,* 424

IMPEACHMENT. See WITNESSES, 4.

INCOME of trust estate. See TRUSTS AND TRUSTEES.

INCOME TAX. See TAXATION, 30–32.

INCOMPETENT PERSONS. See GUARDIAN AND WARD.

INCONSISTENCY in special verdict. See TRIAL, 4.

INDICTMENT AND INFORMATION.

1. Under sec. 4653, Stats., the district attorney in filing an information is not strictly confined to the particular offense stated in the complaint before the examining magistrate, even when the accused waived examination and no testimony was taken. *Dahlgren v. State*, 141
2. Under sec. 4736, Stats., the fact of a prior conviction and sentence of the accused must be stated in the information in order to warrant the punishment provided for in case of a second offense, but such fact is not an essential element of the substantive offense charged and does not alter the nature of that offense. Language in *Paetz v. State*, 129 Wis. 174, qualified. *Ibid.*
3. The statement of the fact of a prior conviction and sentence does not constitute a separate count in the information, and it is not essential that the jury should pass upon it separately and specifically. *Ibid.*

INDORSERS. See BILLS AND NOTES, 1–6.

INDUSTRIAL COMMISSION. See APPEAL, 17, 19. WORKMEN'S COMPENSATION, 9.

INFANTS.

Adoption. See ADOPTION. SPECIFIC PERFORMANCE.

Injuries: Unlawful employment: Settlement of claim. See MASTER AND SERVANT, 7–10.

Same: When are "employees:" "Legally permitted to work." See WORKMEN'S COMPENSATION, 6.

Guardians ad litem: Allowances.

Under sec. 4041*b*, Stats., the supreme court has power to make a proper allowance for services and disbursements in that court of the guardian *ad litem* for infants who are necessary parties to a proceeding in the settlement of an estate; but any allowance for his services and disbursements in the county and circuit courts should be adjusted and made by those courts. *Will of Allis*, 452

INFERENCES OF FACT. See APPEAL, 11.

INFORMATION. See INDICTMENT AND INFORMATION.

INHERITANCE TAX. See TAXATION, 33–36.

INJUNCTION.

See INTOXICATING LIQUORS, 3–5. NORMAL SCHOOLS. RELIGIOUS SOCIETIES.

1. An enterprise involving a great public benefit both to the municipality and to the people of an important city should not be halted and killed by the courts at the suit of an individual citizen whose abstract rights may be infringed upon, but whose injury, if any, will be inconsequential and conjectural. *Bright v. Superior*, 1

2. Thus, in an action by the owner of two small vacant lots on a sandbar in the Bay of Superior, to prevent the consummation of a compromise agreement between the city of Superior and two railway companies pursuant to which the city council had passed an invalid resolution vacating a number of the platted but unimproved streets (including one upon which said lots abutted) in a certain tract of land, partly filled and partly under water, lying for the most part between the original shore line of the bay and the established harbor line,—it appearing, among other things, that the railway companies had acquired by purchase all the submerged lots involved except those of plaintiff; that his lots were distant from the shore and inaccessible except by small boats; that no use had ever been made of them, and none apparently was contemplated; and that the carrying out of the agreement and vacation of the streets would increase rather than decrease the value of plaintiff's lots and would result in a substantial benefit to the city and its people generally,—it is *held* that no injunctive relief should be granted. *Ibid.*

3. Defendants in such action, by their answer, consented that all damages which plaintiff would sustain by reason of the carrying out of said agreement and vacation of said streets might be determined either by the court or a jury at plaintiff's election, and offered to pay such damages when so determined. The trial court, although it determined the amount of such damages, held that plaintiff was entitled to an injunction and he accepted that relief. On appeal, it being held that plaintiff was not entitled to any equitable relief, it is further *held* that although he had made his election of remedies, which would ordinarily be final, yet, the offer of defendants never having been withdrawn, this court may, in order to avoid further litigation, direct a judgment that plaintiff recover the amount of damages so determined. *Ibid.*

INSTRUCTIONS TO JURY.

Form: Special verdict.

Where a case is submitted for a special verdict, the court may properly refuse to give requested instructions which are worded as if the verdict was to be a general one. *Campbell v. Germania F. Ins. Co.* 329

Errors in giving or refusing: When ground for reversal. See APPEAL, 14. AUTOMOBILES, 4. BRIDGES, 3. CRIMINAL LAW, 6–8. EVIDENCE, 2, 3. LIBEL AND SLANDER, 4, 5. STREET RAILWAYS, 3.

Accessory. See CRIMINAL LAW, 6.

Alibi. See CRIMINAL LAW, 7.

Bridges: Defects. See BRIDGES, 3.

Corroboration. See CRIMINAL LAW, 8.

Damages: Punitory, etc. See LIBEL AND SLANDER, 4, 5.

Evidence: Weight. See CRIMINAL LAW, 7, 8. EVIDENCE, 2, 3. STREET RAILWAYS, 3.

Insurance. See INSURANCE, 2.

Negligence. See AUTOMOBILES.

INSURANCE.

When bond is essentially an insurance contract. See BONDS, 6.

Taxation of insurance companies. See TAXATION, 2–14.

Fire insurance: Property destroyed after removal.

1. Where a fire insurance policy provided that property removed from its insured location on account of a fire should be deemed covered by the insurance in its new location for a period of five days, furniture and goods which were removed from a burning house (their insured location) and stored in a barn on the premises, and there destroyed by fire three days later, were within the recoverable loss. *Campbell v. Germania F. Ins. Co.* 329

Same: Partial destruction: Evidence: Instructions to jury.

2. An instruction, in an action on a fire insurance policy, that "you will recall the evidence that a great many articles of personal property were totally destroyed and that some articles were not destroyed but were damaged," is *held* to be in accord with the evidence and not to involve the suggestion that none of the articles of personalty were saved. *Campbell v. Germania F. Ins. Co.* 329

Life insurance: Change of beneficiary: Rights of married women.

3. Sec. 2347, Stats. 1913, relating to the rights of a married woman who is the beneficiary of a life insurance policy, permits the insured, where the right to change the beneficiary is reserved, to change the beneficiary, though a married woman, in conformity with the terms of the reservation. *Hilliard v. Wis. L. Ins. Co.* 137 Wis. 208, followed. *National L. Ins. Co. v. Brautigam,* 270
4. Under sec. 2347, Stats. 1915, a married woman who is made the beneficiary in a life insurance policy takes a vested interest therein subject to be divested in the manner reserved in the policy contract and not otherwise. *Christman v. Christman,* 433
5. Thus, where the right reserved in the policy to change the beneficiary could be exercised only by giving written notice to the company during the continuance of the policy, the insured could not without having given such notice dispose of the policy by will. *Ibid.*
6. The vested right acquired by a wife when she is made the beneficiary in a life insurance policy is not divested by a subsequent divorce from the insured. *Ibid.*

Mutual benefit insurance: Change of beneficiary.

7. Under sec. 1955c, Stats. 1898 (sub. 5, sec. 1957, Stats. 1915), a member of a mutual benefit society may change the beneficiary named in his certificate or policy without the consent of such beneficiary, by complying with the by-laws of the society. *Ormond v. McKinley,* 205

INTENTION. See CONTRACTS, 2, 3. FRAUDULENT CONVEYANCES. MASTER AND SERVANT, 10. REFORMATION OF INSTRUMENTS. STATUTES, 6–11.

INTEREST. See GARNISHMENT, 1. TRUSTS AND TRUSTEES, 8.

INTERLOCUTORY JUDGMENT. See APPEAL, 2.

INTERSTATE COMMERCE. See CORPORATIONS. MASTER AND SERVANT, 6. TAXATION, 2, 3.

INTOXICATING LIQUORS.

Licenses: Premises near school: Remonstrance.

1. A person who signs a remonstrance under sub. 5, sec. 1548, Stats., has no right to withdraw his name therefrom after the remonstrance shall have taken effect by being filed as the statute pro-

vides. *La Londe v. Barron Co.* 80 Wis. 380, distinguished. *State ex rel. Tate v. Wolf,* 390

2. It may be, however, that signatures to such a remonstrance which were procured by fraud should not be counted. *Ibid.*

Sale in violation of law: Public nuisance: Abatement.

3. Under sec. 3180*a*, Stats. 1915, an equitable action may be maintained to enjoin or abate the public nuisance which, by sec. 1563, is declared to exist when any place is used for the sale of intoxicating liquors in violation of law. *State ex rel. Att'y Gen. v. Stoughton Club,* 362

4. Although under sec. 1563 a conviction of the keeper of such a place must be alleged and proved before the nuisance could be abated, there is no such condition precedent to an abatement under sec. 3180*a;* and the legislature had full power to provide the cumulative remedy given by the latter section. *Ibid.*

5. Persons dealing in intoxicating liquors have no vested right to a jury trial upon the question whether or not their place of business is a public nuisance. For such purpose an equitable action constitutes due process of law. *Ibid.*

Action for breach of bond: Judgment: Liquidated damages. See DISTRICT ATTORNEY.

6. An unsatisfied judgment collectible out of a liquor license bond given under sec. 1549, Stats., is not a condition precedent to the maintenance by the state of an action for breach of such bond. *State v. Helmann,* 639

7. For breach of a liquor license bond, judgment, in an action by the state, should go for the full penalty of $500, that being treated as liquidated damages; and the court may then apply the proceeds primarily towards the satisfaction of existing judgment indebtedness, if any, as in said section provided. *Ibid.*

JOINDER.

Of causes of action. See PLEADING, 1, 2, 4.

Of parties. See PARTIES.

JUDGES.

De facto and de jure.

1. The person appointed as judge of a superior court under a void act of the legislature (ch. 518, Laws 1915) which purported to create such superior court, to vest in it all the powers of a county court, and to abolish the latter court, having, under color of such appointment and the provisions of said act, ousted the *de jure* county judge, taken possession of the county court room, records, and papers, and thereafter exercised all the powers and functions of the county judge, became a *de facto* judge of the county court and his acts as such are valid as to third persons. *In re Woolcott,* 34

2. Neither the fact that said appointee acted under the name of judge of the superior court in exercising the functions of the county court, nor the fact that there was in existence a *de jure* judge of the county court, affects the validity of the acts of such *de facto* judge. *Ibid.*

3. *Van Slyke v. Trempealeau Co. F. M. F. Ins. Co.* 39 Wis. 390, and *Fenelon v. Butts,* 49 Wis. 342, distinguished. *Kempster v. Milwaukee,* 97 Wis. 343, explained and language therein qualified. *Ibid.*

Letter to counsel, with findings: Effect. See APPEAL, 12.

JUDGMENT.

Interlocutory judgment. See APPEAL, 2.

Conclusiveness: Upon whom binding.

1. Where the grantor in a deed was a party to an action to quiet title, but the grantee was not, a judgment vacating the deed is not binding on such grantee. *Mitchell v. Lyons,* 399

Same: Foreign judgment: Effect. See DIVORCE, 4–6.

When unconscionable. See MORTGAGES, 2.

In ejectment. See EJECTMENT, 1.

For breach of liquor license bond. See INTOXICATING LIQUORS, 7.

In replevin. See REPLEVIN.

Offsetting judgments: Lien of attorneys: Priority.

2. A motion to offset judgments is addressed to the sound discretion of the court and governed by equitable principles, and when the judgments are in the same action, or actions growing out of the same subject matter, the right of setoff is generally deemed superior to the claim of the attorney in either action for services and disbursements therein. *Rayworth v. Goodrick,* 404

3. The lessor of a farm, claiming that the lease had been breached, commenced an action of replevin and took possession of the crops. In such action the court refused to receive evidence as to claims of the lessor against the lessee connected with the operation of the farm and provided for in the lease, or as to a counter charge of the lessee against the lessor, but suggested that those matters be tried in another action; and the lessee had judgment in the replevin action for the value of the property taken, over and above the rent due. Thereafter in a separate action upon said claims the lessor had judgment against the lessee. *Held,* that both judgments related to the same subject matter, and that the right of the lessor to have them offset was superior to the right of the lessee's attorneys to a lien on the judgment in the replevin action. *Ibid.*

JURISDICTION. See COURTS. HIGHWAYS, 2. PROCESS. RELIGIOUS SOCIETIES, 2.

JURY.

Right to trial by jury. See EQUITY, 2. PHYSICIAN AND SURGEONS, 5.

The practice permitting the bringing in of new parties and the pleading of cross-demands, under secs. 2610, 2656*a*, Stats. 1915, does not deprive parties of their rights to a jury trial, since under sec. 2844, Stats., where a jury issue is presented in connection with an equitable issue, the trial court may direct which shall be first tried, according to the rights of the parties under sec. 2843. *Miley v. Heaney,* 134

Questions for jury. See TRIAL.

Instructing jury. See INSTRUCTIONS TO JURY.

JUSTICES' COURTS. See HIGHWAYS, 2.

LACHES. See MORTGAGES, 1. REFORMATION OF INSTRUMENTS, 3, 4.

LAND CONTRACT. See HUSBAND AND WIFE. REFORMATION OF INSTRUMENTS, 1. VENDOR AND PURCHASER, 2–19.

LANDLORD AND TENANT.

Subletting without consent of lessor: Fraud: Waiver of right to re-enter.

1. In an action to recover damages caused by fraudulent representations, a finding by the trial court that defendant, the lessee of a store building under a lease providing that he should not sublet the premises without written consent of the lessor, fraudulently stated to plaintiffs that he had the legal right and authority to lease the premises to them and had obtained the written consent of the owner so to do, is *held* to be sustained by the evidence. *Leshin v. Routt,* 105
2. Where, after defendant had leased said building to plaintiffs for the remainder of his own term, the lessor at all times received the rent from defendant and, after learning that plaintiffs were not connected in business with defendant but claimed to be his lessees, notified them that the lease to them was without her consent and that they occupied the premises at her will, there was no waiver of her right to re-enter which would entitle plaintiffs to remain in possession as her tenants under the lease to defendant. *Ibid.*
3. Provisions in the lease from defendant to plaintiffs making it subject to all the terms and conditions of the lease to defendant, and that it should be canceled and of no effect whenever defendant's rights as tenant of the owner should cease for any cause, meant that plaintiffs took the lease on the terms contained in the lease to defendant, with the clause against subletting eliminated by written consent of the owner. *Ibid.*

Breach of lease by tenant: Action by landlord. See JUDGMENT, 3.

Lease of mine: Income: Deductions. See TAXATION, 32.

LAW OF THE ROAD. See AUTOMOBILES.

LIBEL AND SLANDER.

Charging criminal offense: Unlawful hunting: Pleading: Presumptions.

1. A letter charging that plaintiff hunted deer during the closed season and demanding that he go to the county seat of a county in this state and settle therefor or he will be prosecuted, was libelous *per se* because charging a criminal offense, the presumption being that the hunting was done in this state. *Mallon v. Tonn,* 366
2. Allegations in a complaint that at a certain place in a county in which it was unlawful at any time to hunt deer defendant falsely stated in the presence of other persons that plaintiff had hunted and shot at deer, and said to plaintiff's hunting companion that unless he went to the county seat and paid his fine he would be prosecuted, are *held,* when liberally construed upon a demurrer *ore tenus,* to state a cause of action for slander, the presumption being that the hunting was done in that county. *Ibid.*

Charging business dishonesty: Damages: Instructions to jury.

3. A notice or warning published in a newspaper, charging buyers of live stock with fraudulently misrepresenting to farmers the condition of the market in order to induce them to sell their stock, imputed business dishonesty and was libelous *per se.* *Cole v. Christensen,* 409

4. A statement in the charge that "damages are of two kinds—compensatory, or punitory, and exemplary," could not have misled the jury where the judge proceeded thereafter to differentiate between compensatory and exemplary or punitory damages at considerable length. *Ibid.*

5. A statement in the charge that the jury "must not understand that the presence or absence of actual malice or ill will has any bearing on the question of punitory damages," and that "plaintiffs are entitled to such damages if they have been libeled," was prejudicially erroneous; but the punitory damages having been separately assessed, the error may be corrected by disallowing them. *Ibid.*

LIBRARIES. See MUNICIPAL CORPORATIONS, 1–3. STATUTES, 4.

LICENSE.
To do business in state. See CORPORATIONS.
To practice medicine. See PHYSICIANS AND SURGEONS, 1–5.
To sell liquor. See INTOXICATING LIQUORS.

LICENSE FEES: Taxation of life insurance companies. See COURTS, 2. TAXATION, 4–11.

LIENS. See JUDGMENT, 2, 3. MECHANICS' LIENS. REPLEVIN, 3–5.

LIFE INSURANCE. See INSURANCE, 3–7.

LIFE INSURANCE COMPANIES. See TAXATION, 2–14.

LIMITATION OF ACTIONS. See GUARDIAN AND WARD.

LIQUIDATED DAMAGES. See INTOXICATING LIQUORS, 7.

LIQUOR LICENSES. See INTOXICATING LIQUORS.

LIVE STOCK. See FRAUD, 3–6.

LOCAL LAWS: Titles. See STATUTES, 2, 3.

LOST INSTRUMENTS. See SPECIFIC PERFORMANCE.

MALICE. See LIBEL AND SLANDER, 5.

MALPRACTICE. See PHYSICIANS AND SURGEONS, 6–8.

MARINE TERMINALS of railroads. See TAXATION, 15–20.

MARKET PRICE. See SALES, 7.

MARRIED WOMEN. See DIVORCE. HUSBAND AND WIFE. INSURANCE, 3–7.

MARSHALS. See WORKMEN'S COMPENSATION, 7.

MASTER AND SERVANT.

Contract for services: Validity. See CONTRACTS, 1.

Wrongful discharge: Remedy: Causes for discharge. See APPEAL, 21.

1. Where an employee is wrongfully discharged, having been paid in full up to that time, his remedy is by action for damages for breach of the contract of employment and not by action for wages under the contract. *Green v. Somers,* 96

2. An employer has the right to give all lawful and reasonable commands deemed by him necessary to the proper management of his business, and the employee's duty is to obey such commands where there is nothing in the contract of employment to relieve him from such duty. *Ibid.*

3. Any inexcusable and substantial insubordination on the part of an employee, or wilful refusal to obey such commands amounting to insubordination, is good ground for discharge; but whether a mere breach of duty—it being in dispute whether wrong was in-

tended or injury inflicted—is good ground for discharge, is a question for the jury. *Ibid.*

4. Where the facts are undisputed and it is certain that the disobedience is wilful and contumacious, it may be the duty of the court to determine as matter of law that the commands given were lawful and reasonable and the refusal to obey inexcusable; and if such be the case there is no question for the jury. *Ibid.*

5. Commands, given by his employer to the general manager of a hotel, to appoint an assistant manager, to have the storekeeper make all purchases, to close the hotel laundry, and to discharge the help privately employed, are *held* as matter of law to have been lawful and reasonable commands which the manager wilfully and inexcusably refused to obey; and the discharge of the manager because of such refusal was lawful. *Ibid.*

Master's liability for injuries. See WORKMEN'S COMPENSATION.

Same: What statute governs: Interstate commerce. See RAILROADS, 10, 11.

6. One who performs work in putting prospective subjects of interstate commerce in a state of preparedness for transportation, is not engaged in interstate commerce within the meaning of the federal Employers' Liability Act. *Sullivan v. Chicago, M. & St. P. R. Co.* 583

Same: Minors unlawfully employed: Misrepresentation as to age: Estoppel.

7. One who, in violation of sub. 1, sec. 1728*a*, Stats., employs a minor under the age of sixteen years without the written permit therein provided for, and is thus guilty of a misdemeanor under sec. 1728*h*, is liable for injuries sustained by the minor as a result of such unlawful employment, and the facts that the minor and his father misrepresented his age in order to secure such employment and that the employer was justified, in the exercise of proper vigilance, in relying upon their representations that the boy was more than sixteen years of age, do not constitute a defense in the action by the minor to recover for such injuries. *Stetz v. F. Mayer Boot & Shoe Co.* 151

8. Nor do the facts above stated form a basis for a counterclaim by the employer against the minor for damages on account of such misrepresentation. *Ibid.*

9. The statute (sec. 1728*a*, Stats.) being declaratory of a public policy, and the act of the employer only, not that of the minor, being made unlawful, the fact that the minor misrepresented his age does not bar or estop him from recovering damages for his injury. *Ibid.*

Same: Settlement with minor: Release by guardian.

10. A settlement agreed upon for injuries to a minor employee and a release signed by his guardian under the mistaken supposition that the claim was governed by the Workmen's Compensation Act, did not settle the claim for damages for his injuries resulting from his employment in violation of sec. 1728*a*, Stats., there being manifestly no such intention; and in any event the release, not having been approved by the county judge as required by sec. 3982, Stats., is not binding upon the minor as to such claim for damages. *Stetz v. F. Mayer Boot & Shoe Co.* 151

Same: Unsafe working place: Duty of master: Findings. See RAILROADS, 10, 11.

11. Under sec. 2394—48, Stats., it is the duty of an employer to furnish his employee employment and a working place as free from danger as the nature of his labor will reasonably permit, and when whether such duty was performed is material and there is room in the evidence for a finding either way, the question is for the jury. *Sullivan v. Chicago, M. & St. P. R. Co.* 583

12. A finding by the jury to the effect that plaintiff, an employee in defendant's lumber yard, was struck and injured by a crosspiece thrown from the top of a lumber pile by another employee, is *held* to be sustained by the evidence, although no one saw the crosspiece strike him. *Szeliwicki v. Connor L. & L. Co.* 20

13. Further findings to the effect that the method of disposing of the crosspieces, as lumber was taken from the pile and loaded upon a wagon, was not reasonably adequate to render plaintiff's place of employment as free from danger as the nature thereof would reasonably permit, and that he was not guilty of contributory negligence, are also *held* to be sustained by the evidence. *Ibid.*

Same: Warning and instructing servant: Latent dangers: Pleading.

14. The duty of an employer to warn and instruct an employee as to hidden or latent dangers of the employment which are known to the employer and unknown to the employee, is one which cannot be delegated. *Bugajski v. Milwaukee Western F. Co.* 116

15. Thus, in this case, although the defendant company had put into effect a positive rule prohibiting its foreman from assigning inexperienced men to work at a niggerhead by means of which and a wire cable cars were moved in and about its coal docks and yards, it was nevertheless liable for negligence of such foreman in setting the plaintiff, an inexperienced laborer, to operate such niggerhead without warning or instruction as to the latent dangers incident to such operation,—it appearing that the foreman had authority to select men and break them in as operators and that plaintiff was subject to his direction. *Gereg v. Milwaukee G. L. Co.* 128 Wis. 35, distinguished. *Ibid.*

16. Although there was no allegation in the complaint as to defective condition of the tracks on which cars were being moved at the time of the accident, the admission of evidence as to their condition was, if error, not prejudicial to defendant. *Ibid.*

Same: Assumption of risk: Contributory negligence.

17. In case of an employee being injured or killed while engaged in the line of his duty as such, and recovery of damages therefor being sought on the ground of want of ordinary care of the employer, or his officer, agent, or servant, the defense of assumption of the risk is not available to such employer. *Sullivan v. Chicago, M. & St. P. R. Co.* 583

18. Where an employee is injured while engaged in the line of his duty, and there are more than four employees working in the common employment, contributory negligence of such employee is not available as a defense against the claim of such employee for damages. *Ibid.*

19. Where a servant of a railroad company, who is not a shop or office employee, is injured and that occurs or is contributed to by violation by such company of any statute enacted for the safety

of employees, and an action is brought to recover damages for the injury, neither contributory negligence nor assumption of the risk is available to the company as a defense. *Ibid.*

20. Findings by the jury to the effect that an engineer who was killed when his train was derailed by a tree which had been blown down across the track was not guilty of contributory negligence and that there was no assumption of the risk, are *held* to be sustained by the evidence. *O'Connor v. C., M. & St. P. R. Co.* 653

Liability for injury to third person. See EVIDENCE, 1.

MATERIALMEN. See BONDS.

MECHANICS' LIENS.

See BONDS, 4, 5.

Notices: Service: Upon whom: When required.

1. A finding of fact to the effect that, because a corporation for which a building was being erected owned all the stock of the corporation which had title to the land and because of the relation of the two companies, service of the lien notices required by sec. 3315, Stats., on either of said companies, however addressed, gave the required notice to both companies, is *held* to be sustained by evidence showing, among other things, such ownership of the stock, that the companies were in interest substantially the same company, that the president of one was vice-president of the other, and that the assistant secretary of one was bookkeeper for the other. *Milwaukee B. S. Co. v. Illinois S. Co.* 48
2. The notices, under said statute, may be served upon the "owner or his agent," and need not be addressed to any one. *Ibid.*
3. Under the facts above stated, claims for liens naming only the corporation having title to land were sufficient, under sec. 3320, Stats., as a basis for liens against the interest of the other company also. *Ibid.*
4. Under ch. 213, Laws 1913, amending sec. 3315, Stats., a principal contractor, in order to be entitled to a lien, was required to serve a notice within sixty days after performing work or labor or furnishing materials, stating the amount due and the fact that a lien was claimed therefor. *Interior W. Co. v. Jahn,* 193

MEDICAL JURISPRUDENCE. See PHYSICIANS AND SURGEONS.

MILWAUKEE CIVIL COURT. See APPEAL, 4, 24.

MILWAUKEE CODE (Ordinances). See MUNICIPAL CORPORATIONS, 4–6.

MINORS. See INFANTS. MASTER AND SERVANT, 7–10. WORKMEN'S COMPENSATION, 6.

MISTAKE. See RAILROADS, 4. REFORMATION OF INSTRUMENTS. TAXATION, 27, 28.

MORTGAGES.

See FRAUDULENT CONVEYANCES, 1, 3.

Deed absolute in form: Reformation.

1. A warranty deed containing a clause by which the grantee assumed two mortgages on the premises was given to such grantee merely as security on his previous indorsement of a note of the grantor. Said assumption clause was inserted by accident and

mistake and there was no consideration therefor. The grantee had not asked for security or a deed, and did not examine the deed or learn its contents until some two years later. In an action against such grantee to enforce liability for the mortgage debts, it appearing that his receiving and holding the deed and failure to discover the assumption clause had not in any way damaged the plaintiff, it is *held* that defendant was entitled to have the deed reformed by striking out such clause and to have it adjudged to be a mortgage executed as security only. *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, and *Van Beck v. Milbrath*, 118 Wis. 42, distinguished. *Broadbent v. Hutter*, 380

Foreclosure: Judgment for deficiency: Fraudulent conveyance.

2. Where mortgaged property was sold on foreclosure for less than the amount due and the mortgagee had judgment for a deficiency, the mere fact, found by the trial court, that at the time of the sale the property was of sufficient value to satisfy the mortgage and unpaid taxes does not show, in the absence of any evidence of overreaching or fraud on the part of the mortgagee, that a judgment afterwards obtained by him against a fraudulent transferee of other property of the mortgagor was unconscionable. *Mahoney v. Kurth*, 56

MUNICIPAL CORPORATIONS.

Powers: Raising money by taxation: Public purposes: Maintaining libraries. See TAXATION, 1.

1. The maintenance of public libraries is a public purpose, and municipalities may be authorized, as in sec. 931, Stats., to raise moneys therefor by taxation. *State ex rel. La Crosse Public Library v. Bentley*, 632
2. The authority given in said sec. 931 is not restricted to the support of libraries established under secs. 931–936*a*; but moneys may be raised and appropriated for the support of other public libraries which are free and serve the whole public in the same way as do those established under the law. *Ibid.*
3. The fact that a public library was established and is administered by a private corporation, controlled by a board of trustees who, except that the mayor of the city is *ex officio* a member, appoint their own successors, does not preclude the city from appropriating to such corporation, for the support of the library, a library fund raised by taxation. *Ibid.*

Same: Special city charter: Implied repeal by general law. See STATUTES, 4, 10.

Ordinances: Building code: Construction: Validity.

4. In sub. (a), sec. 474, art. 39, ch. IV, Milwaukee Code of 1914,—providing that all buildings within the business section "may be occupied or maintained for any purpose whatsoever (if in conformity with all ordinances governing the construction of such buildings)",—the word "construction" relates to the materials which compose such buildings and does not refer in any way to their location. *Hickman v. Wellauer*, 160
5. Sec. 338, art. 27, ch. IV, Milwaukee Code of 1914,—prohibiting the construction of stables within fifteen feet of any residence, dwelling, or place of assemblage,—is limited by sub. (a), sec. 474, above mentioned, and does not apply to the business section. [Whether sec. 338 is valid as applied to the residence district or

the territory outside of the business section of the city, not determined.] *Ibid.*

[6. Under sec. 543, art. 46, ch. IV, Milwaukee Code of 1914, any violation of ch. IV is punishable by a fine of not less than $10 nor more than $200, and it is provided that each day of continued violation shall constitute a separate offense, but that the accumulated penalties recoverable in any one action shall not exceed $2,000. Whether such clause relating to penalties for continuing offenses is void on the ground that the accumulative penalty is excessive, and whether, if void, it is separable from the remainder of the section, not decided.] *Ibid.*

Same: Grade crossings: Track elevation: Police power. See RAILROADS, 1, 2.

Streets: Vacation. See INJUNCTION.

Same: Use: Rules of the road. See AUTOMOBILES.

Torts: Nuisances: Discharge of sewage into watercourse.

7. Legislative authority to install a sewerage system gives a city no right to create or maintain a nuisance, whether such nuisance results from negligence or from the plan adopted. *Johns v. Platteville,* 219

8. A city has no right to discharge sewage into a watercourse in such a way as to infringe upon the rights of riparian owners to the natural flow of water substantially unimpaired in volume and purity. *Ibid.*

9. Findings by the trial court in this case, to the effect that the defendant city properly treated and purified its sewage in septic tanks and that the effluent did not render the waters of the creek in question, which flowed over plaintiffs' land, foul, contaminated, impure, or unfit to be drunk by domestic animals, and hence that there was no nuisance, are *held* to be contrary to the great preponderance of the evidence. *Ibid.*

Taxation: Marine terminals of railroads: Distribution of taxes. See TAXATION, 15–20.

Same: Highways in county system: Bridges. See HIGHWAYS, 3–9.

Same: Withholding of highway tax: Penalty. See TAXATION, 29.

Assignment of cause of action: Power of council: Consideration: Public policy.

10. After a cause of action in tort in favor of the widow of a city employee and against a wrongdoer whose negligence is alleged to have caused such employee's death had, pursuant to sec. 2394—25, Stats., become the property of the city, it reassigned the same to her by an instrument wherein she covenanted that she would prosecute the action; that the assistant city attorney should be retained by her and permitted to act as her attorney and should have full control over the litigation; and that if she should collect any damages therein she would pay to the city, after deducting reasonable charges and expenses incurred, the amount so collected not exceeding the amount which the city had paid to her under the Workmen's Compensation Act, with interest,—any excess to be retained by her. *Held,* that since the widow thereby became liable to a judgment for costs in case she did not recover anything in the action, the assignment to her was not without a valuable consideration moving to the city; nor can it be said that such consideration is so grossly inadequate that the

assignment amounted to a gift of public property for private purposes. *Saudek v. Milwaukee E. R. & L. Co.* 109

11. Such cause of action being, like other property of the city, under the management and control of the council, could be sold by it to any one for an adequate consideration. *Ibid.*

12. The fact that the assistant city attorney was to have control of the litigation and of the amount for which the case might be settled, did not render the assignment void as against public policy—the agreement not being one between attorney and client. *Ibid.*

MUTUAL BENEFIT SOCIETIES. See INSURANCE, 7. TAXATION, 9.

NAVIGABLE WATERS.

That body of water which lies along the northeast front of the city of Superior, though frequently called the Bay of Superior on maps and in public speech, is in fact a widening of the St. Louis river, not an arm of Lake Superior; its bed was the subject of private ownership and platting; and the riparian proprietors might by conveyances separate the ownership of the lands on the bank from the lands in the bed of the river. *Bright v. Superior,* 1

NEGLIGENCE.

See AUTOMOBILES. BRIDGES. EVIDENCE, 1. HOSPITALS. MASTER AND SERVANT, 6–20. PHYSICIANS AND SURGEONS, 6–8. RAILROADS, 5–16. STREET RAILWAYS.

Dangerous substances: Poisonous liquid: Liability of vender.

1. The sale of a poisonous liquid "quack grass destroyer" without proper label and without the purchaser being made aware of its dangerous character, in violation of sub. 5, (a), sec. 1419, Stats. 1913, was negligence *per se.* *Mossrud v. Lee,* 229

2. In an action for the value of cows which died as a result of eating grass on which such poisonous liquid had been applied, it being undisputed that plaintiff and his son had made three separate purchases of the liquid from defendant, that on the last occasion it was not labeled as the law required, and that the liquid then purchased had been applied to the grass which the cows ate, it was not error to confine the jury, in answering the question of defendant's negligence, to the facts in respect to the last sale,—the jury being free to consider, in answering a separate question as to whether negligence in that sale was the proximate cause of the death of the cows, all the evidence in the case, including that which tended to show that plaintiff knew from the circumstances of the first and second purchases and from the effect of the liquid on quack grass that it was dangerous to permit cattle to eat grass which had recently been treated therewith. *Ibid.*

3. Findings by the jury in such case that defendant's negligence in respect to the last sale of the liquid was the proximate cause of the death of the cows, and that plaintiff was not guilty of contributory negligence, are *held* to be sustained by the evidence. *Ibid.*

Articles causing injury: Nail in shoe: Liability of manufacturer.

4. A manufacturer of shoes who fastened the soles with nails in such a way as to give them the appearance of being sewed is not liable to one who was induced by such deception to purchase the

PERSONAL INJURIES. See AUTOMOBILES. BRIDGES, 3. DAMAGES, 2, 3. EVIDENCE, 7, 8. HOSPITALS. MASTER AND SERVANT, 6–20. MUNICIPAL CORPORATIONS, 10–12. NEGLIGENCE, 4, 5. RAILROADS, 5–16. STREET RAILWAYS. WORKMEN'S COMPENSATION.

PERSONAL PROPERTY. See CHATTEL MORTGAGES. CORPORATIONS, 2–5. REPLEVIN. SALES. VENDOR AND PURCHASER, 2, 6.

PHYSICIANS AND SURGEONS.

Practicing without license: Prosecution: Statutes: Validity.

1. Under sub. 9, sec. 1436, Stats. 1915, the attorney retained by the state board of medical examiners may, with the consent of the court and the district attorney, assist the district attorney in prosecutions for practicing medicine without a license. *Piper v. State,* 604
2. The fact that such attorney of the board had assisted the district attorney in a prosecution in the district court before said statute was enacted is not an available objection upon review in the supreme court of a judgment of conviction in the Milwaukee municipal court, in which latter court the case was tried on appeal, after the statute took effect, upon the record returned from the district court. *Ibid.*
3. In a prosecution for practicing medicine and surgery without a license, where the complaint sets out every element of the offense defined by the statute, it need not also state that defendant does not belong to any of the classes of medical and surgical practitioners who are exempted from the law by another section of the statute, that being a matter of defense. *Ibid.*
4. The complaint in such a case may charge the commission of the offense on "information and belief." *Ibid.*
5. Sec. 1435*f*, Stats. 1913,—which declared in substance that every person should be regarded as practicing medicine, surgery, or osteopathy who should append to his name certain words or letters or any other title, letters, or designation which represented or might tend to represent him as engaged in such practice, or who should for a fee prescribe or recommend any drugs or other medical or surgical treatment or osteopathic manipulation for the cure or relief of any bodily injury, infirmity, or disease,—did not make any arbitrary or unlawful classification, nor deprive any person of rights guaranteed by sec. 1, amendm. XIV, Const. of U. S., or sec. 11, art. I, Const. of Wis.; nor does anything in said statute conflict with the right of trial by jury guaranteed by sec. 5, art. I, Const. of Wis. *Ibid.*

Liability for negligence or malpractice.

6. A physician is not required to exercise the highest degree of skill or the utmost care in diagnosis or treatment, but only such reasonable care and skill as is usually exercised by physicians in good standing, of the same school, in the locality in which he is practicing. *Hrubes v. Faber,* 89
7. Thus, a physician could not be held liable for the death of a child from diphtheria, on the ground of negligence or lack of skill in his diagnosis or treatment of the case, merely because he did not have a bacteriological or microscopical examination of the contents of the throat made, where the evidence showed that it was not usual or customary for physicians to have such an examination made except in cases where a membrane was present and

did not show that in this case there was at any time a membrane, and no physician who testified was able to say, upon the evidence as to the symptoms, that defendant should have suspected the presence of diphtheria. *Ibid.*

8. It being established by the evidence in such case, among other things, that, in the absence of a membrane or other symptoms pointing directly to the presence of diphtheria, antitoxin should not be administered; that such symptoms were not present; that the result where antitoxin is not administered in the early stages of diphtheria is uncertain, and that no one can say in a given case what the result would be if antitoxin were administered, a finding by the jury that the death of the child was caused by defendant's failure to exercise ordinary care was based upon mere conjecture and cannot stand. *Ibid.*

Testimony. See EVIDENCE, 8. WITNESSES, 2.

PLATTING LANDS.

See DEDICATION, 2.

Secs. 1–5, ch. 41, R. S. 1849, required that a plat of lands should be certified by the surveyor and acknowledged by the proprietor and recorded. The proprietors of land in the present city of Superior caused a plat thereof to be made, acknowledged, and recorded by one B., a former owner. The surveyor's certificate recited that the plat was made and designed under the direction of one N. "as agent of the proprietors," and it was indorsed as approved by N. as such agent. Afterwards in a duly acknowledged and recorded power of attorney from the proprietors, running to N., the platted lands were described and it was stated that "the town of Superior has been laid out, surveyed and the plat thereof recorded . . . under our direction and authority." *Held*, that this was a complete ratification of the acts of B. and N., and rendered the plat a valid one under said statute. *Bright v. Superior,* 1

PLEADING.

Complaint. See DRAINS, 2. LIBEL AND SLANDER, 2. MASTER AND SERVANT, 16. QUIETING TITLE, 1. RELIGIOUS SOCIETIES.

Same: Joinder of causes of action.

1. Sec. 2647, Stats. 1913, as amended by ch. 219, Laws 1915, still requires that all causes of action united in a complaint must affect all of the parties to the action. *Midland Terra Cotta Co. v. Illinois S. Co.* 190

2. Thus, a cause of action against a building contractor for the amount due for materials purchased and against the owner on his express promise to pay therefor if plaintiff would forego a lien, could not properly be joined with a cause of action for the same debt against the contractor and against a surety company which was liable therefor on the contractor's bond. *Ibid.*

Cross-complaint.

3. A cross-complaint, like other pleadings under the Code, should state the material facts plainly and concisely in ordinary language, without unnecessary repetition. It should not follow the ancient forms which were superseded by the Code. *Miley v. Heaney,* 134

4. In an action to foreclose an assignment, a cross-complaint is *held* to state two causes of action which might be joined and were properly pleadable as cross-demands. *Ibid.*

Counterclaim. See APPEAL, 8. MASTER AND SERVANT, 8.

Demurrer. See APPEAL, 8.

Amendment. See QUIETING TITLE, 1. TRIAL, 1.

5. Where a proposed amendment to a pleading will tend to bring the real controversy between the parties fairly before the court, it should always be allowed, opportunity being given to the opposing party to meet it in case of surprise. *Mallon v. Tonn,* 366

Variance. See MASTER AND SERVANT, 16.

Pleading foreign statute. See STATUTES, 12.

Criminal pleading. See INDICTMENT AND INFORMATION. PHYSICIANS AND SURGEONS, 3, 4.

PLEDGES. See BILLS AND NOTES, 3–8.

POISONS. See NEGLIGENCE, 1–3.

POLICEMEN. See WORKMEN'S COMPENSATION, 7.

POLICE POWER. See RAILROADS, 1.

POLITICAL QUESTIONS. See TAXATION, 25.

POLITICAL RIGHTS. See ELECTIONS.

POSITIVE AND NEGATIVE TESTIMONY. See STREET RAILWAYS, 5.

POSSESSION OF LAND. See BOUNDARIES. EJECTMENT. VENDOR AND PURCHASER, 1.

POWERS. See TAXATION, 33–36.

PRACTICE: Simplification. See RAILROADS, 4.

PRELIMINARY EXAMINATION. See INDICTMENT AND INFORMATION, 1.

PRESUMPTIONS. See ACCOUNT STATED. APPEAL, 9, 16. BILLS AND NOTES, 5. CONTRACTS, 3. LIBEL AND SLANDER, 1, 2.

PRINCIPAL AND AGENT.

Contracts: Of principal or of agent personally?

In an action upon a note given to a foreign corporation for sample machines pursuant to an agency contract between defendants and the corporation, the defense being the breach of a second contract by the terms of which the traveling salesmen of the corporation who negotiated the first contract agreed to sell a certain machine for defendants or to take back said sample machines and settle with the corporation therefor, findings by the court to the effect that such second contract was the personal agreement of said salesmen and was not a part of the contract between defendants and the corporation, are *held* to be sustained by the evidence. *Chas. A. Stickney Co. v. Lynch,* 353

Ratification of agent's acts. See PLATTING LANDS.

Fraud of agent. See VENDOR AND PURCHASER, 2, 3.

PRINCIPAL AND SURETY. See BONDS. PLEADING, 2. REPLEVIN, 1.

PRIOR CONVICTION. See INDICTMENT AND INFORMATION, 2, 3.

PRIVILEGED COMMUNICATIONS. See WITNESSES, 2.

PRIVILEGES: Taxation. See TAXATION, 4–6, 14.

PROCESS.

Amendment. See TRIAL, 1, 2.

1. A summons signed by nonresident attorneys is not wholly void; it is only irregular and the service thereof affords the court jurisdiction to allow such summons to be perfected by amendment. *Hammond-Chandler L. Co. v. Industrial Comm.* 596
2. The rule that a matter which is wholly void cannot be amended does not extend to irregularities, not going to jurisdiction, which are amendable under sec. 2830, Stats., for the purpose and subject to the conditions and restrictions therein mentioned. *Ibid.*

PROFITS: LOSS of. See DAMAGES, 1.

PROMISSORY NOTES. See BILLS AND NOTES.

PROPONENT of will: Liability for attorneys' fees. See WILLS, 2.

PROXIMATE CAUSE. See BRIDGES, 2. EVIDENCE, 8. NEGLIGENCE, 3. RAILROADS, 16.

PUBLIC LIBRARIES. See MUNICIPAL CORPORATIONS, 1–3. STATUTES, 4.

PUBLIC POLICY. See MASTER AND SERVANT, 9. MUNICIPAL CORPORATIONS, 12.

PUNITIVE DAMAGES. See LIBEL AND SLANDER, 4, 5.

QUIETING TITLE.

See JUDGMENT, 1.

1. In an action to quiet title, where the complaint asked for cancellation of only one tax deed, but the proof showed also the invalidity of another tax deed to the same defendant covering a small part of the land, the court properly set aside the latter deed also, treating the complaint as amended to conform to the proof, there being no showing that the defendant was prejudiced by the failure to plead the second deed. *Mitchell v. Lyons,* 399
2. In an action to quiet title, the grantee in tax deeds who pleaded a disclaimer but also defended on the merits and tendered no release as required by sec. 3186, Stats., was not entitled to a dismissal. *Ibid.*
3. In an action to quiet title, brought by the purchaser at an execution sale, the judgment debtor, who was the grantor in a mortgage and deed under which the defendant claims, but who does not himself claim any title, is not a necessary or proper party. *Ibid.*

QUITCLAIM DEED. See VENDOR AND PURCHASER, 20, 21.

RAILROADS.

Taking of land: Elevating tracks: Lowering of street.

1. The lowering of the grade of a street in front of a lot so as to make the street pass under railway tracks is not *damnum absque injuria,* but is a taking of property for railway purposes for which compensation must be made to the lotowner, even though his lot does not touch the railroad right of way, and even though the work is done by the railway company pursuant to a city ordinance enacted under the police power. *Eisler v. Chicago, M. & St. P. R. Co.* 86

2. The taking in such a case, though done long after the railway was built, is none the less a taking by the railway company under its charter powers. The city cannot, in the absence of express legislative authority, confer upon the company any power to take. *Ibid.*

Same: Use of land by consent: Condemnation proceedings by owner.

3. Where the owner of land, by express or tacit consent, has allowed a railway company to occupy his land for railway purposes, he cannot bring an action for trespass, but must proceed under the condemnation statute to have his compensation and damages assessed. *Cronin v. Janesville T. Co.* 436

4. Where, in an action to enjoin street and interurban railway companies from occupying a part of plaintiff's land adjoining the highway with their railway embankment, it appeared that plaintiff had consented to such occupancy by permitting the embankment to exist without objection for nearly three years, so that his only remedy was by condemnation proceedings under sec. 1852, Stats. 1913, the court should, under sec. 2836*b*, Stats. 1915 (Laws 1915, ch. 219, sec. 2), have made an order granting leave to plaintiff to file a petition for condemnation against the defendant company which built and owns the embankment. *Ibid.*

Opening right of way or bridge for drainage ditch, etc.: Recovery of expense. See DRAINS.

Taxation of terminal property. See TAXATION, 15–20.

Fences: Injuries "occasioned" by lack: Trespassers.

5. A finding by the jury that the death of an adult who entered upon defendant's right of way at a street crossing and while walking along the railroad was struck and fatally injured by a passenger train was occasioned in whole or in part by the want of a wing fence on the line of the street, is *held* to be sustained by the evidence. *Trojanowski v. Chicago & N. W. R. Co.* 76

6. Under the circumstances the deceased was not a trespasser nor was his conduct in going upon and walking along the railroad such a deliberate, wanton, and reckless action that his death is to be considered as the result of a wilful exposure to known danger for which no recovery can be had. *Ibid.*

7. Even if, in walking along the tracks, the deceased violated sec. 1811, Stats. 1911, that fact did not defeat the right to recover damages for his death, such right in cases within sec. 1810 being independent of the penal provision of sec. 1811. *Ibid.*

8. Where a boy sixteen years old, having entered upon a railroad right of way at a place where it should have been but was not fenced, boarded a moving freight train and after traveling several miles was killed in attempting to jump from the train while it was in motion, his death was not, within the meaning of sec. 1810, Stats. 1915, "occasioned . . . in whole or in part" by the want of a fence, there being no causal relation between them. *Vaillant v. Chicago & N. W. R. Co.* 548

9. The word "occasioned" in said sec. 1810 means caused incidentally or indirectly. *Ibid.*

Injuries to employees. See MASTER AND SERVANT, 17–20.

Same: Dangerous trees: Power and duty to cut down.

10. Sub. (4), sec. 1828, Stats.,—giving to railway companies power to "cut down any standing trees that may be in danger of falling

on the road,"—is not superseded by the federal Employers' Liability Act, but is more in the nature of an amendment to the charters of such companies. *O'Connor v. C., M. & St. P. R. Co.* 653

11. Even if the federal Employers' Liability Act superseded said sub. (4), sec. 1828, a railway company would still be bound to remove a tree standing so close to its right of way that there was danger of its falling upon the track, or to guard against such danger. *Ibid.*

Same: Negligence in failing to remove trees.

12. Where a large tree standing close to a railroad right of way was dangerous and liable to be blown down across the track by a wind storm such as was likely to occur and ought reasonably to be anticipated by the railway company, the fact that the wind which blew it down was an extraordinary and unusual one does not affect the liability of the company for an injury caused by its falling across the track and derailing a train. *O'Connor v. C., M. & St. P. R. Co.* 653

13. A finding by the jury in such case that the railway company was negligent in failing to patrol the track before the accident is *held* to be sustained by evidence that its sectionmen were located about two and one-half miles away, were under orders to patrol night and day during storms of wind or rain, and were equipped with a motor car which had a speed of twenty miles or more per hour, and that the storm had been raging for half an hour and more before the accident. *Ibid.*

14. The evidence, including the testimony of a least one witness, who was in a position to know, that the tree was dangerous and so regarded, is *held* to sustain a finding by the jury that the railway company was negligent in failing to inspect the tree and its condition. *Ibid.*

Accident at crossing: Collision with automobile: Contributory negligence: Violation of law.

15. Whether or not the driver of an automobile which was struck by a train while crossing the tracks of a railroad was guilty of contributory negligence is *held* to have been a question for the jury, there being evidence showing that there were obstructions to the driver's view of the approaching train, and the evidence being conflicting as to the rate of speed at which he was driving, as to his looking and listening for an approaching train, and as to the absence from the crossing of a flagman, who was customarily stationed there and upon whom the driver, as he testified, relied for warning of danger. *Derr v. Chicago, M. & St. P. R. Co.* 234

16. The fact that an automobile which was struck by a train had not been registered for the current year and was being driven in violation of sec. 1636—47, Stats., does not preclude a recovery for the injuries to the car and the driver, such violation of the law having no causal relation to the accident. *Ibid.*

Street and interurban railways. See STREET RAILWAYS.

RAPE.

Evidence *held* sufficient to sustain a conviction of assault with intent to rape. *Bishop v. State,* 359

RATIFICATION. See PLATTING LANDS.

REAL PROPERTY. See BOUNDARIES. DEDICATION. DEEDS. DIVORCE, 5, 6. EJECTMENT. EXECUTORS, 1. FRAUDULENT CONVEYANCES. JUDGMENT. LANDLORD AND TENANT. MECHANICS' LIENS. MORTGAGES. MUNICIPAL CORPORATIONS, 8, 9. NAVIGABLE WATERS. PLATTING LANDS. QUIETING TITLE. RAILROADS, 1–4. REFORMATION OF INSTRUMENTS. TAXATION, 15–20, 24–26. TENANCY IN COMMON. VENDOR AND PURCHASER. WILLS, 5–8.

REASONABLE DOUBT. See CRIMINAL LAW, 7.

RECEIVERS. See EXECUTORS, 1.

RECRIMINATION. See DIVORCE, 3.

REDEMPTION from tax sales. See TAXATION, 26.

REFORMATION OF INSTRUMENTS.

See MORTGAGES, 1.

1. In an action to reform a land contract a finding that it was the intention of the parties that the wife of the vendee named therein should also be a party and that her name was omitted by mistake is *held* to be sustained by the evidence. *Church v. Nash*, 424

2. A deed establishing a charitable trust, which by mutual mistake does not express the real meaning of the parties, may be reformed in a proper case if the necessary parties are before the court. *Van Brunt v. Ferguson*, 540

3. Even the lapse of years should not preclude the correction of such a mistake, where the delay is satisfactorily explained and no rights of third persons have intervened. *Ibid.*

4. Thus, where the owner of land conveyed it to the trustees of the Wisconsin Consistory (a Masonic body) for the purpose of laying a foundation for a Masonic home for all needy Master Masons and their families, and that was the understanding of the Consistory and its officers, but by mistake the deed, which was drawn by one of said trustees and executed and recorded without careful examination then or for eight years thereafter by either party, contained conditions inconsistent with their intention and understanding, such mistake is corrected, in a suit by the grantor, by reforming the deed so as to make it express the original understanding—the delay being sufficiently explained, no rights of third persons having intervened, and the necessary parties (including the original grantees, the corporation at present holding the title, the present trustees of the Consistory, a sufficient representation, under sec. 2604, Stats., of the 2,700 members of the Consistory, and all the present beneficiaries of the charity) being before the court. *Ibid.*

REFRESHING MEMORY. See WITNESSES, 3.

RELATIVE INJURY. See WORKMEN'S COMPENSATION, 8.

RELEASE of claim for damages. See MASTER AND SERVANT, 10.

RELIGIOUS SOCIETIES.

1. In an action to restrain trustees of a religious society from interfering with the exercise by plaintiff of his rights as a member of the corporation, a complaint alleging that defendants acted unlawfully, beyond the scope of their authority as trustees, and contrary to the constitution, by-laws, and ordinances of the cor-

poration, in causing plaintiff's name to be stricken from the church roll and in denying to him his rights as a member of the corporation, to which he had always paid his dues and contributed large sums of money, and that their acts were neither authorized nor assented to by the corporation, shows that such acts were the personal tort of the defendants; and the corporation itself, though a proper party defendant, is not a necessary party. *Masbruch v. von Oehsen,* 208

2. Upon the facts so alleged the action does not involve an interference with church faith, doctrine, or discipline, nor the review of any action of the corporation through its officers, but is based on an unlawful interference with civil rights secured to the plaintiff by the constitution and by-laws of the corporation, which wrong the civil courts have jurisdiction to prevent or redress. *Ibid.*

REMEDIES. See EQUITY. INTOXICATING LIQUORS, 3–5. MASTER AND SERVANT, 1. RAILROADS, 3, 4. VENDOR AND PURCHASER, 7, 8, 13, 14, 20, 21.

REMEDY: Mistake as to: Changing cause of action. See RAILROADS, 4.

REMONSTRANCE against liquor license: Withdrawal of names. See INTOXICATING LIQUORS, 1, 2.

REPEAL of statutes. See STATUTES, 4–8.

REPLEVIN.

See JUDGMENT, 3.

1. Where, in a replevin action, an undertaking given to secure the return of the property to the defendant was not the undertaking required by sec. 2722, Stats.,—being in this case an undertaking to secure the sheriff on seizure of property under an attachment or execution,—the plaintiff cannot have judgment against the surety. *Hoeffler Mfg. Co. v. Casualty Co.* 184

2. In such a case, the undertaking given being void and no undertaking having been given under sec. 2722, Stats., a judgment absolutely for the value of the property, instead of in the alternative, was erroneous, not being authorized by sec. 2888. *Ibid.*

3. In replevin by a chattel mortgagee, evidence of the discharge of the defendant in bankruptcy was immaterial, since it would not affect plaintiff's right of recovery if he had a lien on the property under the mortgage. *Ibid.*

4. Where, in such action, after the rendition of an erroneous judgment absolutely for the value of the property, the plaintiff caused the property to be seized and sold on execution, and bid it in, thus obtaining by an irregular proceeding what he would have obtained had he taken the proper judgment, such acts did not operate as a waiver of his lien under the chattel mortgage. *Ibid.*

5. Upon reversal of the erroneous judgment in such case, this court directs the entry of the proper judgment in the alternative, under sec. 2888, Stats., and that the execution and all proceedings thereunder be annulled. *Ibid.*

REPUTATION. See CRIMINAL LAW, 5.

RESCISSION of contract. See VENDOR AND PURCHASER, 4–6.

RETURN of income. See TAXATION, 30–32.

RIPARIAN RIGHTS. See MUNICIPAL CORPORATIONS, 8, 9. NAVIGABLE WATERS.

ROADS AND STREETS. See AUTOMOBILES. HIGHWAYS. INJUNCTION. RAILROADS, 1, 2. TOWNS.

RULES OF COURT.
Supreme Court Rule 11 (Briefs), 400, 403.

RULES OF THE ROAD. See AUTOMOBILES.

SAFETY of working place, etc. See MASTER AND SERVANT, 11, 13.

ST. LOUIS RIVER. See NAVIGABLE WATERS.

SALES.

Contract: Construction.

1. Letters and telegrams which passed between the parties are *held* to have constituted an unqualified contract for the sale by defendant to plaintiff of certain quantities of cheese at specified prices, and not a mere brokerage contract. *Birdsong & Co. v. Marty,* 516
2. The term "minimum car" in a contract for the sale of goods to be shipped by rail refers to the smallest amount which will take the carload rate. *Ibid.*
3. Where the contract was for the sale of twenty-five tubs (19,375 pounds) of one grade of cheese and enough of another grade "to make minimum car," and it appeared that 20,000 pounds of cheese constituted a minimum car, the buyer was entitled to receive one tub (775 pounds) of the second grade, it not being shown to be usual or practicable to ship a part of a tub. *Ibid.*

Delivery and acceptance of goods.

4. Defendant gave plaintiff a written order for certain printed matter to be used as part of a posting system. Plaintiff manufactured the goods and delivered to defendant certain boxes and also itemized invoices of the goods, with prices, and demanded payment. Defendant received and retained the boxes without examining or inspecting the contents, but refused to pay for the goods unless one H. would install the posting system, claiming that plaintiff and H. jointly contracted to furnish and install the system. *Held,* that such facts sufficiently show an acceptance by defendant of the contents of the boxes as being the goods specified in the invoices and as complying with the written order. *Fort Wayne P. Co. v. Hurley-Reilly Co.* 179
5. Findings by the court to the effect that plaintiff was not a party to the contract for installing the posting system, and that plaintiff's agreement to furnish the goods included in the written order was a transaction separate from and independent of any contract between H. and the defendant, are *held* to be sustained by the evidence. *Ibid.*

Refusal to deliver: Damages: Market price.

6. Where title has not passed and the seller wrongfully neglects or refuses to deliver the goods, the measure of damages prescribed in sub. 3, sec. 1684*t*—67, Stats., can be applied only when there is an available market for the goods; otherwise, the measure of damages is that fixed by sub. 2 of said section. *Birdsong & Co. v. Marty,* 516
7. Market price is the price at which goods are actually being sold in the market at the time or times in question; and there can-

not be a real market price for a commodity when there is no such commodity for sale in the market. *Ibid.*

8. Where, upon the seller's refusal to deliver goods, the buyer was obliged to buy other goods at a higher price to fulfil his own contracts of resale, the measure of his damages, under sub. 2, sec. 1684*t*—67, was the difference between the original contract price and the price he was obliged to pay. *Ibid.*

Fraud of seller: Damages. See FRAUD, 3–6.

Sales of poisons, etc. See NEGLIGENCE, 1–3.

Sales under chattel mortgages. See CHATTEL MORTGAGES.

Sales by unlicensed foreign corporations: Interstate commerce. See CORPORATIONS.

SALES FOR TAXES. See QUIETING TITLE, 1, 2. TAXATION, 21–26. TENANCY IN COMMON.

SALES OF LAND. See DEEDS. HUSBAND AND WIFE. REFORMATION OF INSTRUMENTS. VENDOR AND PURCHASER.

SANITARIUMS. See HOSPITALS.

SCHOOLS. See NORMAL SCHOOLS. STATUTES, 8.

SERVICE.
Of notices. See MECHANICS' LIENS.
Of summons. See WORKMEN'S COMPENSATION, 9, 10.

SETOFF of judgments. See JUDGMENT, 2, 3.

SETTLEMENT.
Of claim for damages. See MASTER AND SERVANT, 10.
By city treasurer with county treasurer: Penalty. See TAXATION, 29.

SEWERS: Discharge into watercourse. See MUNICIPAL CORPORATIONS, 7–9.

SIGNATURES to remonstrance: Withdrawal. See INTOXICATING LIQUORS, 1, 2.

SLANDER. See LIBEL AND SLANDER.

SODOMY. See CRIMINAL LAW, 4, 5.

SPECIAL LAWS. See STATUTES, 1–4, 10. TAXATION, 17.

SPECIAL VERDICT. See INSTRUCTIONS TO JURY. TRIAL, 4.

SPECIFIC PERFORMANCE.

See ADOPTION, 2. VENDOR AND PURCHASER, 13.

1. To warrant enforcement of specific performance of a contract of adoption where the writing alleged to have contained the contract is lost, the evidence to establish it must be clear, satisfactory, and convincing. *Heath v. Cuppel,* 62

2. In such cases the facts must not only be consistent with performance of such a contract, but must also be such that they cannot reasonably be harmonized with any other theory. *Ibid.*

SPEED-LIMIT STATUTES. See AUTOMOBILES, 3–5.

STABLES: Building restrictions. See MUNICIPAL CORPORATIONS, 5.

STATE AND COUNTY AID. See HIGHWAYS, 3–12.

STATE AND FEDERAL STATUTES. See MASTER AND SERVANT, 6. RAILROADS, 10, 11.

STATES.
Actions against state. See COURTS. TAXATION, 25, 26.
Discrimination against citizens. See CONSTITUTIONAL LAW, 2.

STATUTE OF FRAUDS. See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS. See GUARDIAN AND WARD.

STATUTES.

Constitutionality. See CONSTITUTIONAL LAW. COUNTIES, 2, 3. COURTS. ELECTIONS. HIGHWAYS, 3–6. INTOXICATING LIQUORS, 4, 5. JURY. MUNICIPAL CORPORATIONS, 1. PHYSICIANS AND SURGEONS, 5. TAXATION, 1–11, 14–20, 30, 31.

Same: Partial or total invalidity. See ELECTIONS, 3.

Same: Special laws.

1. Ch. 17, Laws 1915, is not a special law for "incorporating any . . . town," within the meaning of sub. 9, sec. 31, art. IV, Const.; nor is it a special law "for assessment or collection of taxes," within the meaning of sub. 6 of that section. *State ex rel. Ervin v. County Board,* 577

Same: Local laws: Subjects and titles.

2. Under sec. 18, art. IV, Const., where a local law has one fundamental object and the various provisions of the law are mere details which relate or are germane to that object, it is sufficient to state that general object in the title. *State ex rel. Ervin v. County Board,* 577

3. Ch. 17, Laws 1915, embraced but one general subject, and its title—"An act to legalize the acts of the county board . . . in detaching certain territory from the town of . . . and attaching the same to the towns of . . . and in creating the towns of . . . in said county"—was sufficient without any specific reference therein to the apportionment of the indebtedness of the town from which the territory was detached. *Ibid.*

Amendment. See STATUTES, 6–9.

Conflict between statutes. See TOWNS.

Same: General law and special city charter: Implied repeal. See STATUTES, 10.

4. The general law (sec. 931, Stats.) giving municipalities power to levy a tax to provide a library fund, does not conflict with or affect the special provision in the La Crosse city charter authorizing the common council to appropriate from the general fund a sum not exceeding $2,000 annually for the support of the La Crosse Public Library,—the two provisions having manifestly been enacted for different purposes, and the exercise of one power not preventing the exercise of the other. *State ex rel. La Crosse Public Library v. Bentley,* 632

Repeal: Appropriations: Amendment "to read as follows."

5. The legislature can repeal a statute carrying an appropriation and thus put an end to the appropriation, so far as it is unexpended, at any time. If contracts are thereby breached the contractors must resort to other remedies; they cannot insist that the appropriation remains available simply because of an outstanding contract entered into on the faith of it. *State ex rel. Board of Regents v. Donald,* 145

6. As a general rule, where a statute rewrites a former statute and states that it "is amended so as to read as follows," all provis-

ions in the original statute not found in the amending statute are repealed; but if it appear that the legislative intention was otherwise, such intention must prevail. *Ibid.*

7. The legislative intention in such a case is to be determined from the nature and language of the amendment, from other acts passed at or about the same time, and from all the circumstances of the case. *Ibid.*

8. The circumstances attending the enactment of ch. 633, Laws 1915, the fact that it expressly repeals certain other subsections of sec. 172—54, Stats. 1913, and the legislative history of the act show affirmatively that there was no intention, in amending sub. 30 of said section "so as to read," to repeal the appropriations made in 1913 by said subsection for the normal school at Whitewater. *Ibid.*

Construction. See APPEAL, 2, 4, 22, 23. AUTOMOBILES. BONDS, 5. CHATTEL MORTGAGES. CONSTITUTIONAL LAW, 2. CORPORATIONS, 1, 2, 5. COUNTIES, 1, 2. COURTS, 2. CRIMINAL LAW, 1. DISTRICT ATTORNEY. DIVORCE, 1. DRAINS, 1. ELECTIONS. EVIDENCE, 4–6. EXECUTORS, 1. FRAUDS, STATUTE OF. GARNISHMENT, 2. GUARDIAN AND WARD. HIGHWAYS. INDICTMENT. INFANTS. INSURANCE, 3–7. INTOXICATING LIQUORS. JURY. MASTER AND SERVANT, 6–11. MECHANICS' LIENS. MUNICIPAL CORPORATIONS, 2–7. PLATTING LANDS. PLEADING, 1. PROCESS. RAILROADS, 4, 7–11. REPLEVIN, 1, 2. SALES, 6, 8. STATUTES, 1, 3, 4, 6–8. TAXATION, 3, 6, 12, 13, 21–24, 27, 29–32, 35, 36. TOWNS. TRIAL, 1, 2. WILLS, 2. WITNESSES, 1. WORKMEN'S COMPENSATION.

9. The supreme court has no power to amend a statute; it can only, in cases of doubt, ascertain and declare the intent of the legislature. *Interior Woodwork Co. v. Jahn,* 193

10. Conflicts in statutes are to be avoided if that can be reasonably done; and a general statute is not to be construed as amending a special city charter if the two acts do not necessarily conflict in their operation. *State ex rel. La Crosse Public Library v. Bentley,* 632

11. The rule that a penal statute should be strictly construed does not mean that it should be so construed for the purpose of minimizing its effect, but that it should be so construed to effect the legislative intent—that being the sole office of judicial construction. *State v. Helmann,* 639

State and federal statutes. See MASTER AND SERVANT, 6. RAILROADS, 10, 11.

Pleading and evidence.

12. If not pleaded, the law of another state is not admissible in evidence. *Welch v. Dunning,* 535

STOCK AND STOCKHOLDERS. See TAXATION, 31. TRUSTS AND TRUSTEES.

STREET AND INTERURBAN RAILWAYS.

Taking or use of land: Condemnation. See RAILROADS, 4.

Injuries to passengers: Negligence: Findings by jury. See DAMAGES, 2.

1. In an action for injuries sustained in alighting from a street car, findings by the jury that the conductor and the motorman were each guilty of a want of ordinary care in starting the car are not inconsistent, there being evidence that the motorman was negli-

gent in suddenly starting the car and that the conductor was negligent in giving the signal to start before plaintiff had alighted. *Prellwitz v. Milwaukee E. R. & L. Co.* 84

Collisions with vehicles: Contributory negligence: Instructions to jury: Evidence. See EVIDENCE, 7.

2. In an action for personal injuries sustained when plaintiff's electric automobile was struck by a car while crossing the tracks of a street railway, it is *held*, upon the evidence, that the trial court was not clearly wrong in directing a verdict for defendant on the ground that plaintiff was conclusively shown to have been guilty of contributory negligence in failing to see and avoid the approaching car. *Spence v. Milwaukee E. R. & L. Co.* 120

3. A question in a special verdict being as to whether the headlight of an interurban car, in a collision with which plaintiff's intestate was injured, was burning as the car approached the place of the accident, it was error, in instructing the jury, to say that the question was whether the headlight was such as to give efficient light and not a dim and flickering light almost out,—it appearing that it was an electric light and there being no evidence tending to show that it was or could have been burning dimly or flickering. *Pfeiffer v. Chicago & M. E. R. Co.* 317

4. Plaintiff drove out of an alley and started to cross a street from east to west in the middle of a block but, seeing one of defendant's street cars coming south on the west track, stopped his team so that the horses stood partly over the east track. The car stopped about forty feet north of him and he started his horses again, but the car also started and struck his wagon and injured him. The jury found that the motorman was not guilty of gross negligence in the operation of his car; that he could by the exercise of ordinary care have seen the plaintiff in time to have avoided the collision; and that such want of ordinary care was the proximate cause of plaintiff's injuries. *Held*, that negligence of the defendant was sufficiently found. *Canning v. Chicago & M. E. R. Co.* 448

5. Several witnesses having testified that they saw plaintiff stop, others that they did not observe him stop, an instruction as to the relative weight of positive and negative testimony was properly given. *Ibid.*

6. The stopping of the car as stated might well be taken by plaintiff as an invitation to cross first even though the car had the right of way, and it cannot be said as matter of law that he was guilty of contributory negligence in attempting to cross ahead of the car. *Ibid.*

STREETS. See AUTOMOBILES. HIGHWAYS, 4, 5. INJUNCTION. RAILROADS, 1, 2. TOWNS.

SUBSCRIPTIONS. See HIGHWAYS, 12.

SUMMONS. See APPEAL, 3. PROCESS. WORKMEN'S COMPENSATION, 9, 10.

SUPERIOR BAY. See NAVIGABLE WATERS.

SUPERIOR COURT of Fond du Lac county. See JUDGES.

SUPREME COURT. See APPEAL AND ERROR. COURTS. INFANTS. STATUTES, 9.

SURETYSHIP. See BONDS. PLEADING, 2. REPLEVIN, 1.

SURGICAL OPERATION: Refusal to undergo. See WORKMEN'S COMPENSATION, 3.

SURVEYS. See BOUNDARIES.

SURVIVORSHIP. See HUSBAND AND WIFE.

SUSPENSION OF POWER OF ALIENATION. See WILLS, 8.

TAKING OF LAND. See RAILROADS, 1–4.

TAXATION.

Constitutional requirements and restrictions: Uniformity in rule. See TAXATION, 6, 16.

Same: Limitation of amount. See TAXATION, 18.

Same: Special laws. See STATUTES, 1. TAXATION, 17.

Same: Delegation of power. See MUNICIPAL CORPORATIONS, 1–3.

1. The power of taxation cannot be conferred upon municipalities for other than public purposes. *State ex rel. La Crosse Public Library v. Bentley,* 632

Same: Burdening interstate commerce: Life insurance: Investment business.

2. The business of insurance, *i. e.* issuing policies, collecting premiums, and paying losses, is not interstate commerce; but whether that branch of the business of a life insurance company which consists in loaning money upon real estate or other security to citizens of other states is to be deemed a mere incident of the insurance business or should be considered as a separate business and as a form of interstate commerce, is not decided. *Northwestern Mut. L. Ins. Co. v. State,* 484

3. Assuming that the foreign investment business done by a domestic life insurance company constitutes interstate commerce, no burden is placed upon such commerce by the state law (sec. 1220, Stats. 1911: sec. 51.32, Stats. 1913) requiring the company to pay as a license fee a certain percentage of its gross income (excepting therefrom rentals of real estate on which the taxes have been paid, and premiums collected outside the state on policies held by nonresidents) for transacting the business of life insurance in this state. The tax in such case is not levied upon the foreign investment business nor on the receipts therefrom, but on the business of life insurance, and said receipts are simply used in measuring in part the amount of the tax. *Ibid.*

Same: Classification: Life insurance companies: License fees. See COURTS, 2.

4. The Fourteenth amendment does not prevent a state from changing its system of taxation in all proper and reasonable ways, nor from allowing exemptions, nor from imposing specific taxes upon different trades or professions, nor from classifying property for taxation so long as the classification does not invade rights secured by the federal constitution. *Northwestern Mut. L. Ins. Co. v. State,* 484

5. It is within the power of the state to impose upon life insurance companies occupation taxes in the shape of license fees in lieu of other taxes. *Ibid.*

6. The license fees imposed upon life insurance companies by sec. 1220, Stats. 1911 (sec. 51.32, Stats. 1913), are privilege or occupation taxes; and while not subject to the provision in sec. 1,

art. VIII, Const., that "the rule of taxation shall be uniform," they are subject to the general equality clauses of the state constitution and to the clause in the Fourteenth amendment Const. of U. S. guaranteeing "equal protection of the laws." *Ibid.*

7. A classification of life insurance companies according to which license fees of different amounts are exacted must be founded upon real differences of situation and condition affording rational grounds for the difference in treatment. *Ibid.*

8. A classification pursuant to which, in lieu of all other state taxes except taxes on real estate, domestic level-premium life insurance companies are required to pay much larger license fees than are exacted from foreign level-premium companies, is justified by the location for taxing purposes of their vast reserves—those of the domestic companies being taxable in this state while those of the foreign companies are, practically, not so taxable and are presumably subjected to just and adequate taxation in their respective domiciles. *Ibid.*

9. So, also, a classification under which license fees are exacted from level-premium life insurance companies but not from fraternal benefit associations having lodge organizations is justified by real and substantial differences. *Ibid.*

10. The reasons which justify a classification under which domestic level-premium companies pay higher license fees than foreign level-premium companies apply with greater force and justify a similar discrimination between domestic level-premium companies and foreign assessment or stipulated premium companies. *Ibid.*

11. The disparity between the tax burden of the plaintiff insurance company under the license system and that which it would bear if taxed under the income taxation system or the former personal property taxation system is not shown by the complaint in this case to be so great that the statute imposing license fees should be condemned as arbitrarily discriminatory. *Ibid.*

12. Receipts of interest on premium notes and on policy loans or liens constitute a part of the gross income of a domestic level-premium life insurance company, upon which, under sec. 1220, Stats. 1911 (sec. 51.32, Stats. 1913), the three per cent. license fee is to be calculated. The interest on policy loans made to nonresident policyholders, although it may possess some characteristics of premiums, is not a part of the "premiums" collected outside of the state on policies held by nonresidents, within the meaning of said section. *Ibid.*

13. A life insurance company's liability to policyholders, *i. e.* the present value of its outstanding policies valued as required by law, is not an "unconditional debt" within the meaning of our former statutes exempting from taxation so much of the securities and credits of a taxpayer as should "equal the amount of *bona fide* and unconditional debts by him owing." *Ibid.*

Same: Occupation or privilege taxes: How measured.

14. When the state exercises its legitimate and rightful power of taxation of an occupation or privilege, it may rightfully measure that taxation either by property or the receipts from property neither of which are in themselves taxable. *Northwestern Mut. L. Ins. Co. v. State,* 484

Same: Railroads: Marine terminals: Distribution of tax to municipalities.

15. Ch. 407, Laws 1915 (secs. 51.08, 51.29, 51.30, Stats. 1915),—providing for a separate valuation of "any docks, piers, wharves or grain elevators used in transferring freight or passengers between cars and vessels" which have been included in the value of a railroad company's property as a whole, and that the taxes paid by the company which are derived from or apportionable to such separately valued property shall be distributed to the municipalities respectively in which such property is located,—is not void on the ground that it appropriates money of the state to local purposes, since, if the law is otherwise valid, the moneys are not state funds but belong to the municipalities, though collected by the state as a matter of convenience. *State ex rel. Superior v. Donald,* 626

16. Said statute does not in any way violate sec. 1, art. VIII, Const., which requires the rule of taxation to be uniform. *Ibid.*

17. Nor is it in any sense a law "for assessment or collection of taxes," within the meaning of sub. 6, sec. 31, art. IV, Const., since it does not become effective for any substantial purpose until after the assessment and collection of the tax are fully completed. *Ibid.*

18. Even if sec. 5, art. VIII, Const., limits state taxation to a sum sufficient to defray the estimated expenses of the state for the year, the statute does not violate that section, since the tax in question is simply collected by the state as agent of the municipality. *Ibid.*

19. So far as the rate of the tax is concerned there can be no classification of railroad property or subjection of one part to a different rate from that to which the remainder is subjected. *Ibid.*

20. But municipalities in which marine terminals are located being burdened with responsibilities, duties, and financial obligations not shared by municipalities possessing only ordinary railroad property, it cannot be said that the classification made by ch. 407, Laws 1915, is arbitrary or invalid. *Ibid.*

Exemptions: Lands acquired by state: Existing tax liens, how enforced.

21. Under sec. 1038, Stats., property owned exclusively by the state is exempt from taxation; but tax liens which have already accrued at the time the state becomes the owner do not thereupon cease to exist. *Petition of Wausau Inv. Co.* 283

22. In sec. 1034, Stats.—providing that "taxes shall be levied upon all property in this state except such as is exempted therefrom,"—the word "levy" is not used in its strict sense. *Ibid.*

23. Under our statutes the assessment roll is to be deemed completed, except for the correction of mistakes and clerical errors, on the first Monday in August when, under sec. 1064, it is to be delivered to the clerk for filing; and the subsequent levy of taxes must be considered as relating back to said date. *Ibid.*

24. Lands deeded to the state prior to the first Monday in August in any year are exempt from taxation for that year, but lands of which the state becomes owner after that date are not exempt for that year. *Ibid.*

25. The question as to how, if at all, valid tax liens upon lands to which the state has acquired title shall be enforced as against the state is one which the legislature ought first to consider and pass upon, and it is therefore, in this case (involving lands purchased under the forest reserve legislation), left undecided until the legislature shall have had an opportunity to determine what the policy of the state should be. *Ibid.*

26. The state cannot be sued without its consent; and sec. 3200, Stats., does not apply to equitable claims, such as the claim that the state should redeem lands acquired by it from sales thereof for taxes levied prior to such acquisition. *Ibid.*

Refunding taxes paid: Clerical errors.

27. Where, after a taxpayer had examined the assessment roll and found it to be correct as to certain items of his property, the assessor re-entered those items under other heads and by a purely clerical error omitted to strike out the original entries, thus making a double assessment of such items, the taxpayer was not chargeable with constructive notice of such mistake so as to make his payment of the excessive tax a voluntary payment; and he had a legal right to have the excess refunded, which might be enforced under sec. 1164, Stats. *State ex rel. Pabst B. Co. v. Kotecki,* 101

28. Taxpayers may assume the correctness of the entries and the computation made in extending their taxes on the roll, and of the statements made to them at the time of payment, and are not bound before making payment to search the books to ascertain the facts. *Ibid.*

Collection: Settlement with county treasurer: Default of city treasurer: Penalty.

29. The five per cent. penalty provided for in sec. 1117, Stats., for failure of a town, city, or village treasurer to make settlement of the taxes included in his tax roll, is to be imposed for failure to perform official duties, but should not be imposed upon a city treasurer who had collected the tax levied for the county highway fund and was ready to settle with the county treasurer within the time required by law, but was directed by the common council to retain the money until the validity of the law authorizing the tax had been tested in legal proceedings—the constitutional questions involved being of sufficient gravity to justify him in obeying such direction. *Rinder v. Madison,* 525

Taxation of incomes: What constitutes income: Deductions.

30. Income, as the term is used in sec. 1, art. VIII, Const., is the profit or gain derived from capital or labor or from both combined, and it must be money or something equivalent thereto. *State ex rel. Bundy v. Nygaard,* 307

31. Where corporate stock purchased as an investment in 1907 for $110,000 was on January 1, 1911, of the value of $214,000, and was sold in 1914 for $214,000, no part of the last-named amount was taxable as income. The status, as capital, of the entire value of the stock being fixed when the Income Tax Law was first passed, no part thereof could be made into income by legislative enactment. *Ibid.*

32. In making a return for income taxation the lessee of a mine on a royalty basis is not entitled to make any deduction for ore depletion in addition to the sum paid as royalty. Even if the lease

or right to mine is perpetual it is not, for purposes of income taxation, equivalent to ownership. *Klar Piquett Mining Co. v. Platteville,* 215

Inheritance taxes: Taxable transfers.

33. The inheritance tax, being a tax upon the transfer or devolution of property or the right of succession thereto, and not a tax upon the property itself, may be properly levied upon a transfer which becomes effective by appointment after the passage of the law under a power previously created. *Montague v. State,* 58

34. The principle above stated applies to a case where the appointment must be made from a class, as well as to a case where the power is a general one. *Ibid.*

35. The provision in sub. (5), sec. 1087—1, Stats., that a transfer resulting from the failure of the donee of the power to appoint shall be deemed to constitute a taxable transfer equally with a transfer resulting from an appointment, is valid because the failure to act equally affects the course of the succession, and until such failure is complete the succession is not fully determined. *Ibid.*

36. The proviso in sub. (4), sec. 1087—1, Stats., excepting estates vested before the act and contingent interests created by will before the act, does not apply to estates or property created by appointment under sub. (5). *Ibid.*

TAX TITLES. See QUIETING TITLE, 1, 2. TAXATION, 21–26. TENANCY IN COMMON. VENDOR AND PURCHASER, 21.

TENANCY IN COMMON.

Where a tenant in common whose duty it was, under an agreement with his cotenant, to pay the taxes failed to do so but furnished money for a third person to purchase the tax certificates and then procured the assignment thereof to his mother-in-law, who took with notice of the facts and paid no consideration, tax deeds issued to the mother-in-law were properly set aside at the suit of the cotenant. *Mitchell v. Lyons,* 399

TITLE.

Of local law. See STATUTES, 2, 3.

To land. See BOUNDARIES. DEDICATION. DEEDS. DIVORCE, 5, 6. EJECTMENT. HUSBAND AND WIFE. JUDGMENT. NAVIGABLE WATERS. QUIETING TITLE. VENDOR AND PURCHASER.

To personal property. See CORPORATIONS, 3–5. REPLEVIN.

TORTS. See AUTOMOBILES. BRIDGES. DAMAGES, 2, 3. EVIDENCE, 1, 7, 8. FRAUD. HOSPITALS. LANDLORD AND TENANT, 1. LIBEL AND SLANDER. MASTER AND SERVANT, 6–20. MUNICIPAL CORPORATIONS, 7–12. NEGLIGENCE. PHYSICIANS AND SURGEONS, 6–8. RAILROADS, 5–16. REPLEVIN. STREET RAILWAYS. VENDOR AND PURCHASER, 10–19. WORKMEN'S COMPENSATION, 11.

TOWNS.

Division, etc.: Apportionment of indebtedness. See COUNTIES, 1, 2. STATUTES, 1–3.

Powers as to highways. See HIGHWAYS, 1, 2, 10–12.

Same: Improvement of village streets. See ESTOPPEL, 2.

1. Within the meaning of sub. (13), sec. 776, Stats., the exercise by a town of the powers conferred by secs. 905 and 906 upon village

boards in the matter of the improvement of streets "would conflict with the statutes relating to towns and town boards," in that the town board, exercising such powers, might cause one half of the cost of paving a street in an unincorporated village to be paid out of the town treasury and thereby exhaust the power of the town to raise money for highway purposes, and so deprive the electors of the town of the power to raise money for the repair and building of roads and bridges. The right to exercise such powers of village boards cannot, therefore, be conferred upon a town board by resolution of the electors of the town under said sub. (13), sec. 776. *Gertz v. Vaughn,* 557

2. The plan of the laws governing the construction and repair of highways in villages being fundamentally inconsistent with the laws relating to the building and repair of highways in towns, it is immaterial that they do not oppose each other at every point or that the town board might exercise a part of the powers enumerated in secs. 905 and 906 in such a way that there would be no conflict in a particular instance. *Ibid.*

Recovery of moneys subscribed and expended on highways under invalid statute. See HIGHWAYS, 10–12.

TRACK ELEVATION. See RAILROADS, 1, 2.

TRANSACTIONS WITH PERSONS SINCE DECEASED. See WITNESSES, 1.

TRANSFER TAXES. See TAXATION, 33–36.

TREES near railroad track. See MASTER AND SERVANT, 20. RAILROADS, 10–14.

TRESPASS. See RAILROADS, 3, 6, 7.

TRIAL.

Order of trial: Legal and equitable issues. See JURY.

Amendment of process, pleading, or proceeding. See PLEADING, 5. PROCESS. RAILROADS, 4.

1. Under sec. 2830, Stats., the only limit to the power of amendment, when applied for in due course, is that it must be exercised "in furtherance of justice," the only condition of such exercise is that it must be upon such terms as may be just, and the scope of it includes all proceedings in any action and mistakes in any respect. *Hammond-Chandler L. Co. v. Industrial Comm.* 596

2. The rule that a void proceeding is not amendable applies only where there was no power to do the thing attempted to be done in a defective manner; given power to do the thing, and a good-faith, but defective way of doing it, and the infirmity is curable by amendment under sec. 2830, Stats., for the purposes, and subject to the condition and restrictions therein mentioned. *Ibid.*

Offer of evidence: Waiver.

3. Where the court temporarily sustained an objection to a question because of want of sufficient foundation therefor, but indicated that the evidence might be admissible later, saying that the right to recall the witness might be reserved, and, although the basis for the question was thereafter much strengthened, the witness was not recalled, the right to have such question answered was waived. *Campbell v. Germania F. Ins. Co.* 329

Questions for jury. See AUTOMOBILES, 2, 3, 5. BRIDGES, 1, 2. EVIDENCE, 8. FRAUD, 3. HOSPITALS, 2. MASTER AND SERVANT, 3–5, 11–13, 20. NEGLIGENCE, 2, 3, 5. PHYSICIANS AND SURGEONS, 8. RAILROADS, 5, 13–15. STREET RAILWAYS, 1, 2, 6.

Instructions to jury. See INSTRUCTIONS TO JURY.

Special verdict: Sufficiency. See STREET RAILWAYS, 4.

Same: Matters omitted: Presumption on appeal. See BILLS AND NOTES, 5.

Same: Construction. See FRAUD, 4.

Same: Inconsistency. See STREET RAILWAYS, 1.

4. Where two findings in a special verdict are inconsistent, and but one of them has support in the evidence, the other may be disregarded. *Welch v. Dunning,* 535

Trial by court: Findings. See DIVORCE, 2.

5. Where, the only issue in a case being as to whether a will was procured by undue influence, forty-one findings of fact were filed, consisting mainly of a synopsis of evidence and including a wholly unsupported finding of mental incapacity, such practice is condemned. *Will of Lynch,* 466

TRUSTEE IN BANKRUPTCY. See PARTIES.

TRUSTS AND TRUSTEES.

See EXECUTORS, 5, 6. REFORMATION OF INSTRUMENTS.

1. The surplus and undivided profits of a corporation, existing at the time of the death of a stockholder, belong to the *corpus* of his estate rather than to a person who, under a trust devise in his will, becomes entitled to the income and increase of the estate. *Will of Barron,* 275

2. A division of the profits of the corporation for the year during which the stockholder died, and payment of the part deemed to have accrued before his death to the *corpus* and the remainder to the person entitled to the income of the trust estate, was a matter which might be agreed upon and settled by the parties interested. *Ibid.*

3. The so-called unearned increment, or increase in the value of the property constituting the *corpus* of the trust estate, and also any insurance money received in excess of the cost of repairs on a building damaged by fire, belonged to the *corpus.* *Ibid.*

4. Where the trustees, after having purchased corporate shares as part of the trust estate, became entitled, as holders thereof, to subscribe for additional shares and sold such right, the amount received for that right must be treated as ordinary profit on investment, in the absence of evidence furnishing sufficient data for a division thereof between *corpus* and income. *Ibid.*

5. An extra cash dividend on corporate shares held by the trustees belonged to the income and not to the *corpus,* even though the trustees used it as part payment for additional shares in the same corporation. *Ibid.*

6. Where trustees, who hold property of which the income and increase is to be paid to a beneficiary during his life, have a power of sale and reinvestment, the *corpus* of the trust estate at any given time consists of (1) the identical property which was put into the *corpus* by the creator of the trust and still remains on hand, plus (2), to balance any money which originally went into the *corpus,* a like amount of money or property of value equal to such original amount of money, plus (3), if any of the property which originally went to make the *corpus* has been sold, money in amount, or property in value, equal to that part of the

original *corpus* sold plus the net amount of natural or unearned increment up to that time actually realized upon the property sold which was originally part of the *corpus*. *Ibid.*

7. Where in such a case the trustees have purchased and resold property, the profits realized should be divided by assigning to the *corpus* whatever is necessary to make good any losses thereof and keep it at the proper amount under the rule last above stated, and by paying out the remainder as income. *Ibid.*

8. Dividends declared after the death of the life beneficiary upon corporate shares held by the trustees were not income until so declared, and hence did not belong to such beneficiary; but the interest which had accrued upon ordinary loans on securities up to the time of his death, though not payable until thereafter, properly belonged to his estate. *Ibid.*

UNDERTAKINGS. See REPLEVIN, 1, 2.

UNDUE INFLUENCE. See TRIAL, 5. WILLS, 1.

VENDOR AND PURCHASER OF LAND.

Purchase by husband and wife: Title. See HUSBAND AND WIFE. REFORMATION OF INSTRUMENTS.

Bona fide purchasers: Notice of possessor's rights.

1. A defendant who purchased at guardian's sale the interest of minor children in land while plaintiff was in possession thereof, with knowledge that plaintiff had bought the property or claimed an interest therein under some agreement with the parents of the minors, and at a time when the record showed no title in either the parents or the minors, was chargeable with notice of plaintiff's rights and title. *Church v. Nash,* 424

Description of land. See DEEDS.

Fraud of vendor's agent: False representations: Rescission of contract.

2. Where ignorant foreigners who spoke English very imperfectly supposed that in purchasing certain land and personal property they were represented by a fellow countryman in whom they trusted and who assured them that he would give them a good deal and that they could depend upon him in making a fair transaction for them, but who was in fact the paid agent of the vendors, the relation of such agent to the purchasers was of a fiduciary character and for his false statements in respect to the property the vendors are liable, although no artifice or trick was used to induce reliance thereon or prevent investigation. *Miranovitz v. Gee,* 246

3. Under the circumstances above stated the purchasers, having no other means of ascertaining the facts as to the value of the property, had a right to rely upon the representations of the agent relating to the value of the land, the quality of the soil, the extent of the cultivated area, and the value of the stock and crops, and such representations, even though they took the form of expressions of opinion, are to be considered as statements of fact. *Ibid.*

4. The representations made being statements of fact, false, material, and relied upon by the purchasers, they had a right to rescind the contract even though the property was actually worth the price paid for it. *Ibid.*

5. It is not necessary, in such a case, that the representations made be of such a character as to influence the conduct of a person of ordinary intelligence and prudence. *Ibid.*

6. Where plaintiffs had been induced by false representations to purchase land and personal property from defendants for $3,500, paying $800 down and giving a mortgage on the personalty for $600 and a mortgage on the land for $2,100, and defendants knew that plaintiffs could not make the payments, the sale of a small part of the personal property by plaintiffs was not a waiver of the right to rescind. *Ibid.*

Breach of contract by vendor: Resale: Remedies of purchaser: Joint wrongdoers: Parties.

7. One G., who had an interest in land, agreed to procure the title of the other owners and convey to plaintiff for $2,000. Plaintiff paid $50 down, also paid off a mortgage of $258 owing by G., and took possession. Afterwards defendant contracted to purchase the land from plaintiff for $2,500, paid $50 down, and agreed to pay $750 in one month and give a mortgage for the remainder. Plaintiff turned over the possession to defendant. Thereafter, by collusion with G., defendant purchased and got conveyances of the land from G. and the other owners for $2,100. Defendant having defaulted on his contract with plaintiff, the latter sued to foreclose that contract. *Held* that, by conveying to defendant, G. and the other owners had estopped themselves from claiming any purchase money from plaintiff under his contract with G., and that plaintiff, being relieved from that obligation, was not entitled to strict foreclosure or recovery of the full contract price against defendant, but was entitled to enforce against defendant and the land an equitable claim for the amounts ($308) paid out by him, and also the amount ($500) which defendant was to pay to plaintiff over and above what plaintiff was to pay to G., less the $50 which defendant had already paid to plaintiff. *Ditberner v. Bess,* 264

8. On reversal, in such case, of a judgment of foreclosure and for the full purchase price under the contract between plaintiff and defendant, plaintiff is allowed to bring in as parties any persons claiming liens on the land under the defendant, and also to bring in G. as being a joint wrongdoer with the defendant in an attempt to defraud the plaintiff. *Ibid.*

Same: Conspiracy: Sale to another: Measure of damages.

9. One who contracts for the purchase of land has the right to rely upon his vendor's either having the title or procuring it so as to carry out his promise. *McLennan v. Church,* 411

10. A third person who, knowing of a contract for the sale of land and knowing the facts which showed that such contract had not lapsed, offered the owners a higher price for the land and thereby induced the breaking of said contract and a sale and conveyance to himself, was guilty of a fraud upon said vendee, even though he ignorantly supposed that a mere default of the latter had terminated his contract rights. *Ibid.*

11. The breaking of such contract was an unlawful act rendering all who concerted together to that end liable for the damages caused thereby to the vendee. *Ibid.*

12. Under the circumstances stated, the third person who obtained a conveyance of the land from the owners merely took their place

and acquired no greater rights in the land than they had, as against the vendee named in said contract. *Ibid.*

13. The contract in this case being for the sale of two tracts of land and being signed by and binding upon the owner of one tract only, specific performance could not be enforced; but in an action therefor the court could give judgment, against all the parties responsible for the breach of the contract, for the vendee's damages caused by such breach. *Ibid.*

14. The vendee's recovery in such case should not be limited to the amount of purchase money he had paid and interest thereon, but should equal his entire interest in the contract, including the reasonable value of the land to him over what he owed thereon. *Ibid.*

15. The damages must be determined as of the time of the breach of the contract, and neither the use of the land thereafter nor the use of money tendered by the vendee under the contract and which remained idle is to be considered. *Ibid.*

16. Ordinarily, the damages recoverable for breach of a land contract by failure to convey, over and above payments made, is the difference between the contract price and the market value at the time of the breach, with interest to the date of the judgment. *Ibid.*

17. Full compensatory damages are recoverable for the breach of a land contract where the vendor refuses to convey according to his promise and there is any element of bad faith involved, or where he did not have the title when he contracted but took his chances of obtaining it. *Ibid.*

18. Where the breach is of a tortious character the liability therefor extends to such damages as are the natural and ordinary consequences of the act, regardless of whether or not such damages were in contemplation by the parties at the time of making the contract as the probable result of a breach of it. *Ibid.*

19. Where at the time of the breach of a contract to sell land for $4,200 the vendee therein had contracted to sell it to a third person for $5,200, and the breach was the result of collusion between the owners of the land and said third person, who purchased from such owners for $4,900, the value of the land to the vendee at the time of the breach must, in computing his damages, be deemed to have been $5,200. *Ibid.*

Quitclaim deed: Failure of title: Remedy of grantee.

20. The grantee in a quitclaim deed, in the absence of fraud, has no remedy either in law or equity against his grantor for failure of title. *Drott v. Stevens,* 571

21. So *held,* where the grantee, knowing that the grantor's title was based upon a tax deed and that he refused to give a warranty deed, and after obtaining the advice of an attorney, accepted a quitclaim deed in satisfaction of a debt of the grantor to him, both parties acting in good faith and in the belief that the grantor had good title. *Ibid.*

VERDICT. See APPEAL, 10. TRIAL, 4.

VESTED RIGHTS. See INSURANCE, 3–6. INTOXICATING LIQUORS, 5. STATUTES, 5. TAXATION, 36.

VILLAGES.
Improvement of streets. See TOWNS.
Liability for injuries to night marshal. See WORKMEN'S COMPENSATION, 7.

VOLUNTARY APPEARANCE. See HIGHWAYS, 2.

VOLUNTARY PAYMENT. See HIGHWAYS, 12. TAXATION, 27, 28.

WAIVER.
Of objection to incompetency of witness. See APPEAL, 15.
Of right to have action dismissed. See APPEAL, 22, 23.
Of terms of contract. See BONDS, 5.
Of objection to evidence. See BOUNDARIES, 2.
Of objection to charge to jury. See CRIMINAL LAW, 6.
Of allowances. See EXECUTORS, 3.
Of right to re-enter. See LANDLORD AND TENANT, 2.
Of lien under chattel mortgage. See REPLEVIN, 4.
Of right to have question answered. See TRIAL, 3.
Of right to rescind contract. See VENDOR AND PURCHASER, 6.

WARNING servant of latent dangers. See MASTER AND SERVANT, 14, 15.

WATERS.

See DEEDS, 1. INJUNCTION, 2. MUNICIPAL CORPORATIONS, 8, 9. NAVIGABLE WATERS.

By ordinary high-water mark is meant the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark by erosion, destruction of terrestrial vegetation, or other easily recognized characteristics. *Polebitzke v. John Week L. Co.* 322

WHARVES and other terminal property of railroads. See TAXATION, 15–20.

WILLS.

Validity: Undue influence. See TRIAL, 5.

1. A finding of the circuit court that a will was procured to be executed by undue influence of a daughter with whom the testatrix was living is, upon the evidence, *held* not to be so clearly erroneous that it can be disturbed by this court. *Will of Lynch,* 466

Probate: Contest: Fees and costs.

2. Nothing in sec. 2932 or sec. 4041*b*, Stats., authorizes the taxing of attorney's fees in the circuit court against the unsuccessful proponent of a will who, although the will named her executrix and was admitted to probate in the county court, did not qualify as executrix but acted throughout in her individual capacity. *Will of Lynch,* 466

Allowances to guardian ad litem. See INFANTS.

Construction.

3. Rules of construction are not to be applied to ascertain the meaning of a will if it can be ascertained from the will itself and the surrounding circumstances. *Will of Waterbury,* 510

4. Where, after bequeathing certain specific sums, a testatrix directed that the residue of her estate be divided into five equal parts and bequeathed one of those parts to each of five legatees or groups of legatees, it is *held* that, irrespective of whether or not such residuary legatees constitute a class, it was the intention to confine the distribution of the residue to them; and therefore, where one of such residuary legatees predeceased the testatrix, the share of such deceased legatee is not to be disposed of as intestate property, but the entire residue is to be divided among the survivors. *Ibid.*

5. In construing a will a gift to a grandchild cannot be implied from a gift to a daughter, defeasible if the daughter dies without children surviving. *Will of Allis,* 452

6. Paragraph 6 of a will gave property to trustees "to be held for the use, or assignment, of my wife during life, and after her death for a joint summer residence of my children and their families, as they may agree among themselves—particularly those residing in Milwaukee. . . . If at any time it shall be the joint wish of my wife and children residing in Milwaukee, or said children after her death, to have the property sold, it may be sold and the proceeds go into my estate fund." The "estate fund" was a part of a business trust created by the will, and the business and the fund were to remain and be conducted as directed in the will during the minority of the children and the life of the widow. The provisions in respect thereto rather exclude than support the idea that there was any gift out of that fund to the grandchildren. *Held,* that paragraph 6 did not give any interest in the summer residence to grandchildren. *Ibid.*

7. Although some of the provisions in the will evince a purpose to keep the property in the family of the testator, to prevent it from going to strangers to his blood, yet, the testator having made no limitation over to his grandchildren, none can be made, and the grandchildren took under the will no right, title, or interest in the estate. *Ibid.*

8. Whether or not the will was void because the scheme thereof involved an unlawful suspension of the absolute power of alienation, is not decided. *Ibid.*

Disposing of life insurance policy. See INSURANCE, 5.

Settlement of estate: Discharge of executors and trustees. See EXECUTORS, 5, 6.

WITNESSES.

Competency: Transactions with person since deceased. See APPEAL, 15.

1. Where plaintiff's counsel had offered to go into the whole of a transaction between the president of the defendant bank and plaintiff's intestate and had questioned such president in regard to some features thereof, the witness was competent thereafter, under sec. 4069, Stats., to testify on behalf of defendant to other features or details of the transaction not covered by his previous testimony. *Johnson v. Bank of Wisconsin,* 369

Same: Privileged communication to physician.

2. Plaintiff having testified that he told the physician whom he consulted that he was unable to retain his urine, it was error to exclude testimony of the physician that plaintiff did not tell him so; but the error should not in this case work a reversal, there being other evidence which quite satisfactorily showed severe injury. *Canning v. Chicago & M. E. R. Co.* 448

Examination: Refreshing memory.

3. In an action on a fire insurance policy, plaintiff having testified that a list of articles claimed to have been destroyed was correct when made by her and defendant's agent shortly after the fire and that a paper she had was a correct copy thereof, and the absence of the original having been satisfactorily explained, it

was proper to allow her to use such copy to refresh her memory or to read from it, or to allow it to be introduced as part of her evidence. *Campbell v. Germania F. Ins. Co.* 329

Cross-examination. See CRIMINAL LAW, 4.

Impeachment.

4. In an action to recover for the death of a person it was error to permit plaintiff to prove that a witness for defendant had on a certain occasion made a remark indicating personal animosity against the deceased and his family, such testimony being admissible only for purposes of impeachment and after the proper foundation for it had been laid. *Pfeiffer v. Chicago & M. E. R. Co.* 317

Deceased or absent witnesses: Testimony at former trial. See EVIDENCE, 4–7.

WORDS AND PHRASES.
Aggrieved party. See APPEAL, 6.
Audit, in statute. See HIGHWAYS, 7.
Claims and demands, in bond. See BONDS, 2.
Construction, in ordinance. See MUNICIPAL CORPORATIONS, 4.
Corpus of trust estate. See TRUSTS AND TRUSTEES, 1, 3, 5, 6.
Cruel and inhuman treatment, in statute. See DIVORCE, 1.
De facto officers. See OFFICERS.
Detail, in statute. See CHATTEL MORTGAGES.
Determination, in statute. See HIGHWAYS, 1.
Employee, in statute. See WORKMEN'S COMPENSATION, 6, 7.
Employer of four or more employees, in statute. See WORKMEN'S COMPENSATION, 4, 5.
Fiduciary relation. See FILUCIARY RELATION. VENDOR AND PURCHASER, 2, 3.
Grants a new trial, in statute. See APPEAL, 4.
High-water mark. See WATERS.
Income, in constitution. See TAXATION, 30, 31.
Income of trust estate. See TRUSTS AND TRUSTEES, 1, 5, 7, 8.
Incorporating a town, in constitution. See STATUTES, 1.
Interlocutory judgment. See APPEAL, 2.
Interstate commerce. See CORPORATIONS. MASTER AND SERVANT, 6. TAXATION, 2.
Legally permitted to work, in statute. See WORKMEN'S COMPENSATION, 6.
Levy, in statute. See TAXATION, 22, 23.
Liberty of speech, in constitution. See ELECTIONS, 2.
Market price. See SALES, 7.
Minimum car, in contract. See SALES, 2, 3.
Novation. See NOVATION.
Occasioned, in statute. See RAILROADS, 8, 9.
Order. See APPEAL, 2.
Ownership. See TAXATION, 32.
Person, in constitution. See CONSTITUTIONAL LAW, 2.
Policeman, in statute. See WORKMEN'S COMPENSATION, 7.
Practicing medicine, in statute. See PHYSICIANS AND SURGEONS, 5.
Premises of the employer, in statute. See WORKMEN'S COMPENSATION, 2.
Premiums, in statute. See TAXATION, 12.
Privilege tax. See TAXATION, 6.
Proximately caused by accident, in statute. See WORKMEN'S COMPENSATION, 3.

WORDS AND PHRASES — con.
Public library, in statute. See MUNICIPAL CORPORATIONS, 2, 3.
Public purpose. See MUNICIPAL CORPORATIONS, 1.
Retrial, other action or proceeding, in statute. See EVIDENCE, 6, 7.
Statement in detail, in statute. See CHATTEL MORTGAGES.
Strict construction. See STATUTES, 11.
Substantive felony, in statute. See CRIMINAL LAW, 1.
Taking of property. See RAILROADS, 1.
Unconditional debts, in statute. See TAXATION, 13.

WORKMEN'S COMPENSATION.

Conditions of liability: Performing service growing out of employment: "Premises of employer."

1. Under sec. 2394—3, Stats. 1913, an employee going to or from his employment is not "performing service growing out of and incidental to his employment" except while he is "on the premises of his employer." The rule announced in *Milwaukee v. Althoff*, 156 Wis. 68, is limited accordingly. *Hornburg v. Morris*, 31
2. Where city streets are used by an employee of the city solely for the purpose of going to and from an employment carried on at a definite place other than a street, they are not the "premises of his employer," within the meaning of said statute. *Ibid.*

Same: Disability not proximately caused by accident.

3. Where an applicant under the Workmen's Compensation Act unreasonably refuses to undergo a safe and simple surgical operation which is fairly certain to result in a removal of the disability and is not attended with serious risk or pain and is such as an ordinarily prudent and courageous person would submit to for his own benefit and comfort if no question of compensation were involved, the disability which the claimant suffers thereafter, a reasonable time being allowed for recovery, is not proximately caused by the accident, but is the direct result of such unreasonable refusal; and he is not entitled to compensation therefor. *Lesh v. Illinois Steel Co.* 124

What employers are within the act: Farmers.

4. In the Workmen's Compensation Act (sub. 2, sec. 2394—5, Stats.) the language "every employer of four or more employees in a common employment" was intended to include only such employers as ordinarily or for some considerable length of time employ four or more employees in a common employment; and mere temporary, though regularly recurring, employment of four or more men for a specific purpose does not bring the employer within the act. *Kelley v. Haylock*, 326
5. Thus, the employment by a farmer of more than four men for limited times in threshing, corn shredding, silo filling, or tobacco work does not bring him within the Compensation Act. *Ibid.*

Who are employees: Minor unlawfully employed: Village marshal.

6. A minor under sixteen years of age who, at the time of his employment and injury, had not obtained a written permit authorizing his employment as required by sub. 1, sec. 1728*a*, Stats., was not "legally permitted to work under the laws of the state" within the meaning of sub. (2), sec. 2394—7, Stats., and hence was not an "employee," within the meaning of the latter section, whose

rights in respect to such injury were governed by the Workmen's Compensation Act. *Foth v. Macomber & W. R. Co.* 161 Wis. 549, distinguished and limited. *Stetz v. F. Mayer B. & S. Co.* 151

7. The night marshal of a village, having the powers and duties of a village peace officer, is a "policeman" and therefore an "employee" of the village within the meaning of sec. 2394—7, Stats.; and the village is liable to make compensation for an injury accidentally sustained by him in performing a duty incident to his office, whether in the enforcement of a village ordinance or of a state law. *Kiel v. Industrial Comm.* 441

Release of claim. See MASTER AND SERVANT, 10.

Scale of compensation: Relative injury: Partial loss of vision.

8. Under that part of sub. (5), sec. 2394—9, Stats., generally referred to as the relative injury clause,—providing for compensation which "shall bear such relation to the amount" stated in the schedule "as the disabilities bear to those produced by the injuries named in the schedule,"—an employee whose injuries resulted in the permanent loss of four fifths of the vision of one eye, but did not affect his earning capacity, was properly awarded indemnity to the amount of four fifths of the allowance provided in the schedule for "total blindness of one eye." *Northwestern F. Co. v. Industrial Comm.* 161 Wis. 450, distinguished. *Stoughton Wagon Co. v. Myre,* 132

Action to set aside award: Service of summons.

9. The language of sec. 2394—19, Stats., to the effect that service upon the industrial commission in a specified way shall be deemed a completed service, relates only to service on the commission. *Hammond-Chandler L. Co. v. Industrial Comm.* 596

10. The requirement of sec. 2394—19 that the adverse party shall be joined as a defendant with the industrial commission, by necessary implication, requires service of the summons to be made upon such party, and that he be accorded all rights of a defendant, in an action. *Ibid.*

Liability of third person: Assignment of cause of action. See MUNICIPAL CORPORATIONS, 10–12.

11. A city fireman who was injured while using the streets solely for the purpose of going to an employment carried on at a definite place other than a street had no lawful claim against the city under the Workmen's Compensation Act, and no continued payment of salary during his disability could create a claim against the city or operate as an assignment to it, under sec. 2394—25, Stats. 1913, of any cause of action in tort which he might have against another party for the injury. *Hornburg v. Morris,* 31